Memorandum

To:        Elbert County Planning Commission
From:      Kyle Fenner, CDS Director
Date:      April 19, 2016
RE:        Amendment to Elbert County Subdivision Regulations - Replace section to existing Section XII, E.

Intent:
To present a proposed amendment to the Elbert County Subdivision regulations to address already existing illegal parcels. This amendment will offer an administrative process through which a land owner can bring their illegal parcel into compliance with Elbert County Zoning and Subdivision Regulations.

Request:
This proposed amendment “Replacement of Section XII, E” began as a request from the Board of Commissioners. The Board expressed to staff that they wanted CDS to find a way to universally address the parcels that have been come to be known as “XX” parcels. There are myriad reasons that these parcels came into being - the board wanted a single way to bring them into compliance with the zoning regulations.

History:
In 1972 Colorado’s Senate Bill 35 became state law, requiring counties to pass regulations to regulate the subdivision of land which created any parcel smaller than 35 acres. The result of this bill is that since May 1972 any parcel created that is less than 35 acres must have been approved by the Board of County Commissioners to be considered “valid” or “legal”. Therefore any parcel that was created after May 1972 that did NOT go through a formal subdivision process was created “illegally”. There are a number of ways these illegal parcels come into being.

In the past, to bring illegal parcels into compliance and adhere to regulations, the owner has been required go through a rezone and through a minor subdivision process. State statute allows for the Board of County commissioners to determine if a parcel can be exempt from the subdivision regulations; staff does not have that authority. But exempting a parcel from subdivision requirements doesn’t affect the zoning and a 5-acre parcel when cut from an A-zoned parcel cannot retain the A-zoning because of the size of the new parcel. All the current Elbert County zone
districts are distinctly and specifically defined by their size. No A-zoned parcel smaller than 35 acres can be created. Even when a parcel is granted an exemption from SB 35, the zoning is not a component of that exemption. In the past, the new parcel still had to go through a re-zone process.

The creation of non-conforming “XX” parcels reached a zenith during the foreclosure era in the late 2000s. Many banks, when loaning on a property, didn’t encumber the whole property. They often only encumbered five acres around a house and the driveway when a house was built on larger land. When the land was very large and only 5 acres was foreclosed on, the foreclosure only created a single illegal parcel. But a foreclosure like this on a 35-acre parcel created TWO illegal parcels; the courts created the new 5 acre parcel (around the house and driveway) and then that left a 30 acre parcel unencumbered; neither can remain a “legal” A-zoned parcel because of their size; they are both fewer than 35 acres.

Elbert County’s zone districts are tied directly to the size of the parcel. So a parcel that is 40 acres that suddenly is split into a 35 acre parcel and a 5 acre parcel presents problems. The 35 acres was zoned “A” because anything 35 acres or greater is zoned “A”. The new “35” would stay “A” because of its size. The 5-acre parcel would be non-conforming and could not stay A-zoned. It would have to be rezoned to RA-1 because of its size.

Other court actions that can create this type of parcel include: divorce and possibly certain wills. Other “XX” properties were created willfully by people who simple didn’t go through the subdivision process when they should have. The subdivision regulations do not accept “not knowing” as an excuse for creating illegal parcels. Others were created when towers were built on large tracts. Some are what appear to be railroad remnants and a handful of others are burial plots. Not all of these parcels will even need zoning but for the ones that do, this amendment will prove useful.

As we know the County or County staff can’t just grant zoning nor does the action of the courts create zoning. Zoning is a legislative action (individually assigned and approved) therefore it must go through a legislative process; zoning can only be assigned by the ‘governing body’ in the jurisdiction. In this case, the BOCC has to assign or rezone a property to a zone district. The court action does create a possibility for SB 35 exemption but the parcel still needed to be zoned properly.

This proposed amendment creates a simplified process for already existing “illegal” parcels to gain legal zoning. Without legal zoning permits cannot be issued on the property and sales and title work is challenging.

Process:
This process must be initiated by the land owner. Elbert County will not seek out these parcels or encourage owners to engage in this process. This must be undertaken by and completed by the owner (or assign) of the property. Following is a step by step discussion on each part of the proposed amendment.
This is an added section to existing Section XII, E. The entire Section XXII, E. will be re-recorded and pages 54-55 Elbert County Subdivision Regulations will be replaced. The following is the entire amendment in italics and staff comments are non-italicized and prefaced with “Staff Comment”.

BEGIN PROPOSED AMENDED LANGUAGE (this language will replace the language that starts on page 54 “Section E.” of the ECSR and all of page 55 to Section XIII):

A. Exemption from Subdivision for Certain Undocumented Subdivisions (AKA XX and NZ properties) Created Prior to MONTH_____________ DAY______, 2017 (Date that this amendment was implemented by Elbert County).

Definitions:

Illegal Lot/Parcel: A lot or parcel of land which was created without having been formally reviewed and approved by the appropriate county agencies, boards and/or departments.

Purpose: The purpose of this subsection is to bring some illegal parcels that were created without proper County approval into compliance with adopted County regulation and/or code.

Proces:

1. After following the process outlined in this Section, some parcels created for any reason but without proper County approval as described in this section prior to MONTH_____________ DAY______, 2017, may be considered legal by an administrative decision of the Community & Development Services Director or designee.

2. On rare occasion, by virtue of its very small size or unusual shape, a parcel cannot be granted zoning through this process. A parcel must meet the criteria for the smallest zone district in the Elbert County Zoning Regulations, as amended. Parcels that do not meet these minimum criteria will not be granted zoning through this process and may appeal as outlined in this section.

Staff Comment: Staff uses the term “may” because there can be very specific circumstances zoning a parcel is inappropriate and/or impractical. The parcel may simply have remain “as is” and be labeled “NZ” (no zoning) because it is unbuildable. This may be because it is a railroad or survey remnant or a small parcel created around a tower or a burial plot. To award these parcels zoning would give them development rights when they do not meet the very basic criteria for setback, dimensions, etc.

3. Parcels created by Court Order (e.g. divorce, bankruptcy, foreclosure) but without proper County approval must be brought into compliance through the exemption process described in this section before any development permits can be issued for them.
Staff Comment: This is the sensible step of getting zoning granted to parcels that were created without any deliberate actions of anyone. They are simply created and it is in the County’s best interest to get them into compliance so improvements can be made and title can transfer.

4. All parcels rendered legal by following the process outlined in this Section are subject to all applicable development requirements of these Land Use Regulations, et. seq., the Environmental Health Department’s ISDS regulations, et. seq. as well as any other agency that has jurisdiction.

5. The Division of Water Resources shall have sole authority over the issuance of well permits for both situations mentioned above.

Staff Comment: Numbers 3 and 4 above make it clear that while this process is an abbreviated, administrative method of bringing an illegal parcel into zoning compliance, this process in no way waives any of the other development criteria and requirements of the County or any other governing agency.

6. No land that is currently or ever has been platted or described on a recorded document as open space shall be considered under this section of these regulations.

Staff Comment: Encountering this is unlikely but it could be possible. In older subdivisions there have been platted open space parcels that went to tax sale. This statement simply protects open space in perpetuity as it was intended. While this may not be a necessary statement, staff thought it was an important point to make should anything regarding open space be discovered.

7. Following approval, Applicant shall prepare for recording, the approved exemption from subdivision exhibit. The exhibit shall be recorded within one-hundred and eighty (180) days of the Administrative Hearing decision date. Rezone will not become effective until all fees are paid and all documents recorded. If recording does not take place within said one-hundred and eighty (180) days, the approval of said exemption and rezone shall be deemed null and void.

Staff Comment: This simply outlines some of the requirements and timelines for the applicant. One-hundred and eighty days for recordation is a very standard time period and it allows the applicant plenty of time to make corrections required by staff.

8. Parcels that are granted Exemption from Subdivision as described by this Section and that complies with all the requirements of, and meets all the Standards of this Section, shall be granted zoning by Elbert County based on the size of the parcel and the zone district it most closely resembles in size as described in Part II of the Elbert County Zoning Regulations, et. seq. If a parcel falls between two zone districts based on its size, it shall be zoned toward the smaller, more restrictive zone district.

9. Up-zoning shall not be considered in this Section, where up-zoning is defined for this Section as: A change in the zoning classification of a property from one of lower use to one that is of higher use; for
example, a change from residential to commercial use. No zoning shall be changed into or up-zoned to a commercial zone district under this Section.

Staff Comment: This amendment isn’t designed to improve a person’s property other than to make it a developable, residential parcel.

10. The process described in this Section shall be initiated by the applicant.

Contents of Lot Consolidation Application.

The Applicant shall deliver one (1) original and one (1) copy of all application materials required by this Section to the Community & Development Services Department in hard copy. At time of application, the Applicant shall also deliver an identical digital version of the application materials on a non-returnable CD or flash drive. The Community & Development Services Director or designee may request additional copies of documents larger than 8½ by 11 inches where necessary to provide sufficient documentation for unanticipated referrals. The digital copies of the application (with all accompanying documentation) shall be digitally collated into individual and complete applications capable of easy distribution to referral agencies if necessary.

Submittal Requirements:

1. A completed application in the form approved by the County;
2. Payment of all required application fees;
3. Proof of ownership for all lots to be consolidated;
4. A Final Plat substantially in the form required by Section IX of these regulations, et. seq., except that the Community & Development Services Director or designee may exercise discretion to relax some of the formal Plat requirements for good cause. The Applicant shall also provide or satisfy the following:
   a. The title of the plat shall prominently identify the name of the recorded subdivision or a basic legal description, together with the phrase "Administrative Subdivision Exemption Plat & Rezone."
   b. The final plat shall require an approval sign off from the jurisdictional Fire District and the CDS Community & Development Services Director or designee.

Staff Comment: Because this is an abbreviated, administrative process there is no referral period. Staff felt that it was important to include the fire district so they would be aware that a “new” legal parcel was created in their district. This process essentially allows the formerly undevelopable parcel to be developed and this is something fire districts should know.

5. Evidence that property taxes have been paid and are current.
Appeal

This administrative decision may be appealed to the Board of County Commissioners in accordance with Section XIII, E. 5. of these S Regulations. In hearing such an appeal, the Board shall also consider a recommendation from the Planning Commission.

END PROPOSED AMENDMENT LANGUAGE

Staff Comment: All administrative processes require an appeal process. This process would channel it first to the Planning Commission and then to the Board for a final decision. It is unlikely that appeals will be seen because there are very few instances where this process would result in an administrative denial. If an application meets the criteria of this section, it is most likely to be approved.

Conclusion:

Elbert County has never had a universal way of addressing illegally created parcels. In the past, compliance required a landowner or applicant to go through a formal SB 35 exemption process in addition to a formal rezone process. These two processes could cost in the thousands of dollars and take several months to complete. In the interest of efficiency and expedience it is staff’s opinion that creating this universal process to “clean up” the existing illegal parcels and a method of addressing new parcels created by court actions is in the County’s best interest.

Recommendation:

To approve Amendment to Elbert County Subdivision Regulations - replacement of Section XII, E.

Respectfully,

Kyle Fenner
Director, CDS
Section XII, E. (Replaces pages 54-55 Elbert County Subdivision Regulations)

Exemptions from Subdivision.

IMPORTANT NOTE CONCERNING 35-ACRE LOT EXEMPTION: Although Owners may lawfully create Lots of thirty five (35) acres or larger without County subdivision approval, such Lots are subject to all regulations governing the use of property in Elbert County, including but not limited to, restrictions imposed by the applicable zone district classification (uses, setbacks, building heights, etc.), access, road and street standards, preservation of natural areas, and building permit requirements. The exemption from County subdivision approval is not an exemption from County regulation of the property’s use and County development requirements.

IMPORTANT NOTE CONCERNING LOT CONSOLIDATION EXEMPTION: Elbert County provides to Owners a voluntary and administrative procedure (no hearings, notice, or meetings required) to assist Owners in the consolidation of legally recognized Lots. This voluntary procedure can be found at Section XVIII of these Subdivision Regulations. This voluntary procedure ensures that the Owner properly conforms to the requirements of the Lot Consolidation Exemption and records a properly executed plat map. The plat map enables the County to recognize the legality of the Consolidated Lot and facilitates County approval of building permits. Owners are encouraged to take advantage of the County Lot Consolidation Procedure found at Section XVIII of these Subdivision Regulations.

A. Purpose. Certain divisions of land are exempt from the subdivision regulations if the division is not defined as a subdivision by 30-28-101, C.R.S., or if the Board of County Commissioners determines that such a division is not within the purposes of the subdivision statute, Section 30-28-133, C.R.S., et seq., or of these Subdivision Regulations. Although exempt from the subdivision regulations, uses of land on parcels of land created through subdivision exemption are subject to other County regulations.

B. Types of Subdivision Exemptions. The Board of County Commissioners has established the following types of subdivision exemptions.

1. Statutory Exemptions. The divisions of interests in land to which the term “subdivision” and “subdivided land” does not apply pursuant to Section 30-28-101 (10) (b) (c) and (d), C.R.S. are statutory exemptions. Easements and rights-of-way shall not be considered interests for the purposes of this Section 6-101.

a. Large-lot land divisions.

i All tracts of land thirty-five (35) acres or greater in size created after January 1, 1973 and which are not part of a recorded subdivision are considered to be parcels created by exemption, pursuant to 30-28-101 (10) (b), C.R.S.

ii Any division of land which creates parcels of land comprising thirty-five or more acres of land and none of which is intended for use by multiple owners.

b. Any division of land created by the court pursuant to the procedure set forth in Section 30-28-101 (10) (d), C.R.S. if the Board of County Commissioners has been given the notice and opportunity to join as a party of interest in the proceeding for the purpose of raising the issue of an intent to evade the statutory requirements for subdivision of land.

c. Any division of land which is created by a lien, mortgage, deed of trust, or any other security instrument.
d. Any division of land which is created by a security or unit of interest in any investment trust regulated under state law or any other interest in an investment entity.

e. Any division of land which creates cemetery lots.

f. Any division of land which creates an interest in oil, gas, minerals, or water which is severed from the surface ownership of real property.

g. Any division of land which is created by the acquisition of an interest in land in the name of a husband and wife or other persons in joint tenancy or as tenants in common. Any such interest shall be deemed as only one interest for purposes of satisfying the requirements of this Section.

h. Any combination of contiguous parcels of land into one larger parcel which meets the following conditions.

   i. If the resulting parcel is less than thirty-five acres in land area, only one interest in the land is allowed.

   ii. If the resulting parcel is thirty-five (35) acres or greater in land area, the land area divided by the number of interests in the resulting parcel equals thirty-five (35) or more acres per interest.

2. Consolidation of contiguous parcels or lot mergers initiated by the County shall comply with the statutory requirements of 30-28-139, C.R.S.

3. **Boundary Line Adjustments.** Revisions to boundary lines of metes and bounds parcels as described in, Section XII, D. of these regulations.

C. **Exemption from Subdivision for Certain Undocumented Subdivisions** (AKA XX and NZ properties) Created Prior to **MONTH DAY, 2017** (Date that this amendment was implemented by Elbert County).

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