DECISION AND FINDINGS OF
THE DESCHUTES COUNTY HEARINGS OFFICER

FILE NUMBER:	247-21-000183-V
HEARING DATE:	July 20, 2021, 6:00 p.m.
HEARING LOCATION:	Videoconference and Barnes and Sawyer Hearing Rooms Deschutes Service Center 1300 NW Wall Street Bend, OR 97701
APPLICANT:	Robin Delaney and William Delaney
SUBJECT PROPERTY/ OWNER:	The Subject Property is located at 15780 TUMBLE WEED TURN, SISTERS, OR 97759 ("Property") Map and Taxlot: 141028C002700
REQUEST:	The applicant is requesting an Area Variance to the front yard setback requirement for an accessory building in the Rural Residential Zone (RR-10) and Airport Safety (AS) combining zone. The Area Variance would allow the Applicant to complete construction of an accessory structure (pole barn) previously approved through building permit 247-20-006829-STR and which has been mostly constructed on the Subject Property.
STAFF CONTACT:	Cynthia Smidt, Associate Planner
HEARINGS OFFICER:	Tommy A. Brooks
SUMMARY OF DECISION:	The request for an Area Variance is DENIED. Based on the findings below, the Hearings Officer concludes that the Applicant has not met its burden to show compliance with the provisions of Deschutes County Code Chapter 18.132.

I. APPLICABLE STANDARDS AND CRITERIA

Deschutes County Code

Title 18, Deschutes County Zoning Ordinance
- Chapter 18.60, Rural Residential Zone (RR-10)
- Chapter 18.80, Airport Safety Combining Zone (AS)
- Chapter 18.116, Supplementary Provisions
- Chapter 18.120, Exceptions

Chapter 18.132, Variances

Title 22, Deschutes County Development Procedures Ordinance

II. BACKGROUND, MATERIAL FACTS, AND PROCEDURE

The Applicant in this matter seeks an Area Variance to a required front yard setback.

The Subject Property is in the Rural Residential Zone (RR-10) and Airport Safety (AS) combining zone. In the RR-10 Zone, of Deschutes County Code ("DCC" or "Code") 18.60.040 provides the front yard setback shall be a minimum of 20 feet from a property line fronting on a local street right of way. The subject property fronts Tumble Weed Turn, a local street.

In October 2020, a representative acting on behalf of the Applicant obtained building permit 247-20-006829-STR for a pole barn structure on the Subject Property. According to the Applicant, the structure is intended to house two 40-foot RVs. The site plan submitted for the building permit illustrated a front yard setback of 20 feet and an orientation that would have the shorter side of the 60' x 40' pole barn facing the street.

Applicant's contractor began constructing the pole barn shortly after the building permit was issued. According to the Applicant's statement during the Hearing, the original planned location for the pole barn was very close to a septic drain field. While the foundation would not be on the leach lines in that field, the Applicant nevertheless agreed to shift the structure's location toward the road, away from the drain field, but was assured by the contractor that the new location was still within the required front yard setback. The foundation for the structure was then constructed, but with a different orientation such that the long side of the structure would now face the street.

On or about December 18, 2020, the Applicant became aware, through communications with neighbors, of a concern that the location of the pole barn may be too close to the street. Those same concerns were shared with the County and, on December 22, 2020, the County made contact with the Applicant's contractor, at which time the County requested the contractor stop construction until the front yard setback was reevaluated. According to the Applicant's testimony during the Hearing, the setback was measured at that time and it was determined the pole barn was likely 19 feet from the road, one foot closer than was authorized. The contractor and/or the Applicant believed construction could continue because the 1-foot difference could be allowed as a "minor variance." Nevertheless, on January 6, 2021, instead of seeking a minor variance from the County, the contractor submitted a revised site plan illustrating the new orientation of the building and a setback of 21 feet from the road. Construction continued through January, at which time it was determined the pole barn was approximately 15 feet from the road. Although the pole barn is not "complete," the only remaining work to be done is electrical work, interior siding, and painting. The structure itself is now built.

The measurements for the setback identified above appear to have all been made using different methods at different times. After the Hearing, but prior to the record closing, the Applicant submitted figures prepared by a surveyor, dated July 28, 2021, that depicts the location of the pole barn (labeled "New Building"), but which appears to show the corner of the pole barn as being 14.2 feet from Tumble Weed Turn. However, the Applicant continues to request an Area Variance establishing a front yard setback of 15 feet.

A. Notice and Hearing

On June 22, 2021, the County issued a Notice of Public Hearing for this matter ("Notice").

Pursuant to the Notice, I presided over the evidentiary hearing ("Hearing") as the Hearings Officer on July 20, 2021, at 6:00 p.m. Due in part to ongoing restrictions for public gatherings in response to the COVID-19 outbreak, the Hearing was held in part via videoconference with County Planning Staff ("Staff"), the Applicant, and other participants appearing in person in the hearing room.

At the beginning of the Hearing, I provided an overview of the quasi-judicial process and instructed participants to direct comments to the approval criteria and standards, and to raise any issues a participant wanted to preserve for appeal to the Land Use Board of Appeals ("LUBA"). I stated I had no *ex parte* contacts or bias to declare. At the Hearing, I asked for and received no objections to the County's jurisdiction over the matter or to my ability to preside as Hearings Officer.

At the conclusion of the Hearing, and at the request of the Applicant, I announced that the record would remain open for written materials as follows: (1) any participant could submit additional materials until July 27, 2021; (2) any participant could submit rebuttal materials until August 3, 2021 ("Rebuttal Period"); and (3) the Applicant only could submit a final legal argument after the Rebuttal Period and until August 10, 2021, at which time the record was closed.

B. 150-day Clock

The Application was originally submitted on February 26, 2021. The County sent an incomplete application letter on March 26, 2021. The Applicant responded with additional information on March 26, May 26, and June 16, 2021. The Planning Division deemed the Application complete and accepted it for review on June 16, 2021. Based on these dates, the 150th day on which the County must take final action on this application was originally November 13, 2021.

Pursuant to DCC 22.24.140(E), a continuance or record extension is subject to the 150-day clock, unless the Applicant requests or otherwise agrees to the extension. Here, the Applicant requested the extension. The record extension therefore extends the 150-day clock and the deadline for the County to make a final decision is now December 4, 2021.

III. FINDINGS AND CONCLUSIONS

A. Adoption of Staff's Basic Findings

The record includes a Staff Report. The Staff Report contains a section of Basic Findings including a determination that the Subject Property is a lot of record and describing the general site. No participant to the proceeding objected to those portions of the Staff Report and I hereby adopt those sections of the Staff Report as part of these Findings.

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B. Title 22, Deschutes County Development Procedures Ordinance

1. Compliance with Section 22.20.015 - Code Enforcement and Land Use

A. Except as described in (D) below, if any property is in violation of applicable land use regulations and/or conditions of approval of any previous land use decisions or building permits previously issued by the County, the County shall not:

1. Approve any application for land use development;
2. Make any other land use decision, including land divisions and/or property line adjustments;
3. Issue a building permit.

B. As part of the application process, the applicant shall certify:

1. That to the best of the applicant's knowledge, the property in question, including any prior development phases of the property, is currently in compliance with both the Deschutes County Code and any prior land use approvals for the development of the property; or
2. That the application is for the purposes of brining the property into compliance with the Deschutes County land use regulations and/or prior land use approvals.

C. A violation means the property has been determined to not be in compliance either through a prior decision by the County or other tribunal, or through the review process of the current application, or through an acknowledgement by the alleged violator in a signed voluntary compliance agreement ("VCA").

D. A permit or other approval, including building permit applications, may be authorized if:

1. It results in the property coming into full compliance with all applicable provisions of the federal, state, or local laws, and Deschutes County Code, including sequencing of permits or other approvals as part of a voluntary compliance agreement;
2. It is necessary to protect the public health or safety;
3. It is for work related to and within a valid easement over, on, or under the affected property; or
4. It is for emergency repairs to make a structure habitable or a road or bridge to bear traffic.

FINDING: DCC 22.20.015(A) generally prohibits the County from approving any land use application development if the subject property is "in violation" of applicable land use regulations and/or conditions of approval of any previous land use decisions. Under DCC 22.20.015(C), however, a violation exists only if the property has been determined to not be in compliance through a prior decision by the County or other tribunal, through the review process of the current application, or through a signed voluntary compliance agreement. As noted in the Staff Report, the County's Board of Commissioners has advised

that, for "prior decisions", the issue must have been fully adjudicated, and the Board also cautions Hearings Officers against concluding a violation exists as part of the review process, except in rare cases.[1]

The record reveals that Deschutes County has an active code compliance case, 247-21-000262-CE, related to the setback of the pole barn at issue in this matter. That case, however, is currently being held in abeyance – meaning there has not been a full adjudication of that issue. The record also does not contain evidence of a signed voluntary compliance agreement. The requested Area Variance, therefore, can be approved (if it meets the variance criteria) unless, through this review, the Hearings Officer determines that a violation exists on the Subject Property.

No participant has requested a determination in this proceeding that a setback violation does or does not exist. Instead, the Applicant seeks an Area Variance that, if granted, would negate the need to adjudicate the setback issue in the enforcement proceeding. I therefore find that, as presented by the Applicant, and consistent with the guidance from the County's Board, it is not necessary to determine whether a violation of the front yard setback exists. The result of this conclusion, however, is that the criteria for an Area Variance must be applied as if the pole barn did not exist and as if the Area Variance was part of the initial approval of the pole barn before it was constructed.

C. Title 18, Deschutes County Zoning Ordinance

1. Compliance with Chapter 18.60 - Rural Residential Zone (RR-10)

(a) Section 18.60.020. Uses Permitted Outright.

The following uses and their accessory uses are permitted outright.

A. A single-family dwelling, or a manufactured home subject to DCC 18.116.070.

FINDING: The pole barn would be an accessory use to the single-family dwelling on the Subject Property. As described by the Applicant, the pole barn would be used as a garage-like structure for housing two personal-use RVs. Such an accessory use is permitted outright in the RR-10 Zone, and there does not appear to be any claim to the contrary in the record. The pole barn is therefore an allowed use subject to the specific requirements for such uses and this criterion is met.

(b) Section 18.60.040. Yard and Setback Requirements.

In an RR 10 Zone, the following yard and setbacks shall be maintained.

A. The front setback shall be a minimum of 20 feet from a property line fronting on a local street right of way, 30 feet from a property line fronting on a collector right of way and 50 feet from an arterial right of way.
B. There shall be a minimum side yard of 10 feet for all uses, except on the street side of a corner lot the side yard shall be 20 feet.
C. The minimum rear yard shall be 20 feet.
D. The setback from the north lot line shall meet the solar setback requirements in DCC 18.116.180.

[1] *See* County files 247-17-000775-ZC and 247-17-000776-PA).

E. In addition to the setbacks set forth herein, any greater setbacks required by applicable building or structural codes adopted by the State of Oregon and/or the County under DCC 15.04 shall be met.

FINDING: There is no dispute that the proposed structure complies with the setbacks in sections (B) through (E) of this Code provision. The Subject Property fronts Tumble Weed Turn on the property's eastern boundary. It is undisputed that the applicable setback from this street is 20 feet. It is also undisputed that the Applicant seeks to locate the pole barn 15 feet from Tumble Weed Turn. This criterion cannot be satisfied without the approval of an Area Variance for the front setback, which is addressed later in these Findings.

(c) Section 18.60.050. Stream Setbacks

To permit better light, air, vision, stream or pollution control, protect fish and wildlife areas and to preserve the natural scenic amenities and vistas along streams and lakes, the following setback shall apply:

A. All sewage disposal installations, such as septic tanks or septic drainfields, shall be set back from the ordinary high-water mark along all streams or lakes a minimum of 100 feet, measured at right angles to the ordinary high-water mark. In those cases where practical difficulties preclude the location of the facilities at a distance of 100 feet and the County Sanitarian finds that a closer location will not endanger health, the Planning Director or Hearings Body may permit the location of these facilities closer to the stream or lake, but in no case closer than 25 feet.

B. All structures, buildings or similar permanent fixtures shall be set back from the ordinary high-water mark along all streams or lakes a minimum of 100 feet measured at right angles to the ordinary high-water mark.

FINDING: According to the Application and the Staff Report, the Subject Property is not adjacent to a stream or lake. Therefore, this criterion is met.

(d) Section 18.60.060. Dimensional Standards.

In an RR 10 Zone, the following dimensional standards shall apply:

A. Lot Coverage. The main building and accessory buildings located on any building site or lot shall not cover in excess of 30 percent of the total lot area.

FINDING: According to the Application and the Staff Report, the proposed and existing structures located on the Subject Property will not, cumulatively, cover in excess of 30 percent of the total lot area. Therefore, this criterion will be met.

B. Building Height. No building or structure shall be erected or enlarged to exceed 30 feet in height, except as allowed under DCC 18.120.040.

FINDING: The record contains elevation drawings indicating the pole barn would not exceed 30 feet in height. Therefore, this criterion is met.

(e) Section 18.60.080. Rimrock Setback.

Setbacks from rimrock shall be as provided in DCC 18.116.160.

FINDING: According to the Application and the Staff Report, there is no rimrock in the vicinity of the Subject Property. Therefore, this criterion is met.

2. Chapter 18.80 - Airport Safety Combining Zone (AS)

(a) Section 18.80.020. Application of Provisions.

The provisions of DCC 18.80.020 shall only apply to unincorporated areas located under airport imaginary surfaces and zones, including approach surfaces, transitional surfaces, horizontal surfaces, conical surfaces and runway protection zones. While DCC 18.80 identifies dimensions for the entire imaginary surface and zone, parts of the surfaces and/or zones do not apply within the Redmond, Bend or Sisters Urban Growth Boundaries. The Redmond Airport is owned and operated by the City of Redmond and located wholly within the Redmond City Limits.

Imaginary surface dimensions vary for each airport covered by DCC 18.80.020. Based on the classification of each individual airport, only those portions (of the AS Zone) that overlay existing County zones are relevant.

Public use airports covered by DCC 18.80.020 include Redmond Municipal, Bend Municipal, Sunriver and Sisters Eagle Air. Although it is a public-use airport, due to its size and other factors, the County treats land uses surrounding the Sisters Eagle Air Airport based on the ORS 836.608 requirements for private-use airports. The Oregon Department of Aviation is still studying what land use requirements will ultimately be applied to Sisters. However, contrary to the requirements of ORS 836.608, as will all public-use airports, federal law requires that the FAA Part 77 surfaces must be applied. The private-use airports covered by DCC 18.80.020 include Cline Falls Airpark and Juniper Airpark.

FINDING: The record indicates that the Subject Property is located beneath the conical surface for the Sisters Eagle Air Airport. Therefore, the provisions of this chapter apply, and the applicable provisions are addressed below.

(b) Section 18.80.028. Height Limitations.

All uses permitted by the underlying zone shall comply with the height limitations in DCC 18.80.028. When height limitations of the underlying zone are more restrictive than those of this overlay zone, the underlying zone height limitations shall control. [ORS 836.619; OAR 660-013-0070]

A. Except as provided in DCC 18.80.028(B) and (C), no structure or tree, plant or other object of natural growth shall penetrate an airport imaginary surface. [ORS 836.619; OAR 660-013-0070(1).

B. For areas within airport imaginary surfaces but outside the approach and transition surfaces, where the terrain is at higher elevations than the airport runway surfaces such that existing structures and permitted development penetrate or would penetrate the

airport imaginary surfaces, a local government may authorize structures up to 35 feet in height.

C. Other height exceptions or variances may be permitted when supported in writing by the airport sponsor, the Department of Aviation and the FAA. Applications for height variances shall follow the procedures for other variances and shall be subject to such conditions and terms as recommended by the Department of Aviation and the FAA (for Redmond, Bend and Sunriver.)

FINDING: According to information in the Staff Report, which is not contested, the Sisters Eagle Air Airport has a runway elevation of 3,165 feet and the conical surface for this airport above the Subject Property has an approximate elevation of 3,410 feet. The proposed structure will have a maximum elevation of 3,169 feet above sea level. This criterion is therefore met.

(c) Section 18.80.044. Land Use Compatibility.

Applications for land use or building permits for properties within the boundaries of this overlay zone shall comply with the requirements of DCC 18.80 as provided herein. When compatibility issues arise, the Planning Director or Hearings Body is required to take actions that eliminate or minimize the incompatibility by choosing the most compatible location or design for the boundary or use. Where compatibility issues persist, despite actions or conditions intended to eliminate or minimize the incompatibility, the Planning Director or Hearings Body may disallow the use or expansion, except where the action results in loss of current operational levels and/or the ability of the airport to grow to meet future community needs. Reasonable conditions to protect the public safety may be imposed by the Planning Director or Hearings Body. [ORS 836.619; ORS 836.623(1); OAR 660-013-0080].

A. Noise. Within airport noise impact boundaries, land uses shall be established consistent with the levels identified in OAR 660, Division 13, Exhibit 5 (Table 2 of DCC 18.80). Applicants for any subdivision or partition approval or other land use approval or building permit affecting land within airport noise impact boundaries, shall sign and record in the Deschutes County Book of Records, a Declaration of Anticipated Noise declaring that the applicant and his successors will not now, or in the future complain about the allowed airport activities at the adjacent airport. In areas where the noise level is anticipated to be at or above 55 Ldn, prior to issuance of a building permit for construction of a noise sensitive land use (real property normally used for sleeping or as a school, church, hospital, public library or similar use), the permit applicant shall be required to demonstrate that a noise abatement strategy will be incorporated into the building design that will achieve an indoor noise level equal to or less than 55 Ldn. [NOTE: FAA Order 5100.38A, Chapter 7 provides that interior noise levels should not exceed 45 decibels in all habitable zones.]

FINDING: According to the Staff Report, the Subject Property is not within the noise impact boundary associated with the Airport. This criterion therefore does not apply.

B. Outdoor lighting. No new or expanded industrial, commercial or recreational use shall project lighting directly onto an existing runway or taxiway or into existing airport approach surfaces except where necessary for safe and convenient air travel. Lighting for these uses shall incorporate shielding in their designs to reflect light away from airport approach

surfaces. No use shall imitate airport lighting or impede the ability of pilots to distinguish between airport lighting and other lighting.

FINDING: As noted above, the pole barn is accessory to a residential use and, therefore, does not involve an industrial, commercial, or recreational use. However, this criterion also requires that no use shall imitate airport lighting or impede the ability of pilots to distinguish between airport lighting and other lighting. The Applicant does not appear to address this criterion. As the Staff Report notes, compliance with this criterion can be achieved through a condition of approval. However, because this Decision ultimately denies the Area Variance, no such condition is warranted.

C. Glare. No glare producing material, including but not limited to unpainted metal or reflective glass, shall be used on the exterior of structures located within an approach surface or on nearby lands where glare could impede a pilot's vision.

FINDING: The Applicant does not appear to address this criterion. As the Staff Report notes, however, compliance with this criterion can be achieved through a condition of approval. However, because this Decision ultimately denies the Area Variance, no such condition is warranted.

D. Industrial emissions. No new industrial, mining or similar use, or expansion of an existing industrial, mining or similar use, shall, as part of its regular operations, cause emissions of smoke, dust or steam that could obscure visibility within airport approach surfaces, except upon demonstration, supported by substantial evidence, that mitigation measures imposed as approval conditions will reduce the potential for safety risk or incompatibility with airport operations to an insignificant level. The review authority shall impose such conditions as necessary to ensure that the use does not obscure visibility.

FINDING: As noted above, the pole barn is accessory to a residential use and is not an industrial, mining or similar use, or expansion of an existing industrial, mining or similar use. This criterion therefore does not apply.

E. Communications Facilities and Electrical Interference. No use shall cause or create electrical interference with navigational signals or radio communications between an airport and aircraft. Proposals for the location of new or expanded radio, radiotelephone, and television transmission facilities and electrical transmission lines within this overlay zone shall be coordinated with the Department of Aviation and the FAA prior to approval. Approval of cellular and other telephone or radio communication towers on leased property located within airport imaginary surfaces shall be conditioned to require their removal within 90 days following the expiration of the lease agreement. A bond or other security shall be required to ensure this result.

FINDING: The Applicant does not appear to address this criterion. However, the Application also does not appear to include any radio, radiotelephone, or television transmission facilities that the Code contemplates would cause electrical interference. Because this Decision ultimately denies the Area Variance, no further discussion of this criterion is necessary.

F. Limitations and Restrictions on Allowed Uses in the RPZ, Transitional Surface, Approach Surface, and Airport Direct and Secondary Impact Areas.

For the Redmond, Bend, Sunriver, and Sisters airports, the land uses identified in DCC 18.80 Table 1, and their accessory uses, are permitted, permitted under limited circumstances, or prohibited in the manner therein described. In the event of conflict with the underlying zone, the more restrictive provisions shall control. As used in DCC 18.80.044, a limited use means a use that is allowed subject to special standards specific to that use.

FINDING: According to the Staff Report, the pole barn will not be located within or beneath one of the identified surfaces in this section. This criterion is therefore met.

(d) Section 18.80.050. Uses Permitted Outright.

Any uses permitted outright in the underlying zone with which the AS Zone is combined shall be allowed except as provided in DCC 18.80.044.

FINDING: As noted in a previous finding, the pole barn is allowed as a use permitted outright in the RR-10 Zone. The pole barn is therefore allowed outright in the AS Combining Zone and this criterion is met.

3. Compliance with Chapter 18.116 - Supplementary Provisions

(a) Section 18.116.100. Building Projections.

Architectural features such as cornices, eaves, canopies, sunshades, gutters, chimneys and flues shall not project more than three feet into a required yard, provided that the projection is not closer than three feet to a property line.

FINDING: The purpose of the Application is to obtain an Area Variance to reduce the required setback, which would accommodate the entirety of the pole barn, including any building projections. This criterion therefore cannot be met unless the Area Variance is approved, which is addressed below.

4. Compliance with Chapter 18.120 - Exceptions

(a) Section 18.120.030, Exceptions to Yard Requirements.

The following exceptions to yard requirements are authorized for a lot in any zone:

...

B. Architectural features such as cornices, eaves, sunshades, gutters, chimneys and flues may project into a required yard in accordance with DCC 18.116.100. Also, steps, terraces, platforms, porches having no roof covering and fences not interfering with the vision clearance requirements may project into a required yard. Signs conforming to the requirements of DCC Title 18 and all other applicable ordinances shall be permitted in required yards.

FINDING: According to DCC 18.60.040, there is a requirement for a front yard setback of 20 feet for the Subject Property. The purpose of the Application is to obtain an Area Variance to reduce the required setback, which would accommodate the entirety of the pole barn, including any architectural features. This criterion therefore cannot be met unless the Area Variance is approved, which is addressed below.

5. Compliance with Chapter 18.132 - Variances

(a) Section 18.132.020. Authority of Hearings Body.

A variance may be granted unqualifiedly or may be granted subject to prescribed conditions, provided that the Planning Director or Hearings Body shall make all of the following findings:

A. Area variance.

FINDING: DCC 18.04.030 defines an "area variance" as "a variance which does not concern a prohibited use. Usually granted to construct, alter or use a structure for a permitted use in a manner other than that prescribed by the zoning ordinance."

The Applicant is requesting a variance for an allowed use – the pole barn – to construct that use in a manner other than that prescribed by the Code. Specifically, the Applicant seeks to vary the distance the Code prescribes for the front yard setback from Tumble Weed Turn. An Area Variance is therefore available if the variance criteria are satisfied.

1. That the literal application of the ordinance would create practical difficulties resulting in greater private expense than public benefit.

FINDING: The literal application of the Code requires the pole barn to be set back 20 feet from the road. The record is completely devoid of any evidence that there are or would be practical difficulties for satisfying this requirement. To the contrary, the Applicant twice proposed to the County that the pole barn could meet the front yard setback – once when the building permit was sought in October 2020 (showing a 20-foot setback) and once when the site plan was modified in January 2021 (showing a 21-foot setback).

In general, the record indicates that the Subject Property, which is approximately 0.98 acre in size, has relatively level topography and is not heavily developed. The central region of the property is developed with a single-family dwelling, detached garage, and two sheds. The position taken in the Staff Report is that there is sufficient area on the property to locate the pole building while satisfying the applicable setback, which the Applicant has not disputed.

Rather than focus on the practical difficulties of constructing the pole barn with a proper setback, the Applicant describes the practical difficulties as being the need to remove and relocate the structure if the standard is strictly applied. The Applicant's position creates two problems, each of a circular nature. First, as noted above in the findings addressing DCC 22.20.015, the Applicant's request is to approve the Area Variance in order to avoid a potential Code violation rather than to cure an adjudicated violation. This means the variance criteria must be applied as if the pole barn were being approved for the first time and not yet constructed. Otherwise, the Applicant would have to acknowledge that there is an existing violation on the Subject Property and, under DCC 22.20.015, no new land use approvals could be granted until the violation is fixed, including the Area Variance. Second, the Applicant seeks to treat the location of the pole barn as both the source of the practical difficulty and the means for eliminating that difficulty. That is, the Applicant wants to place a pole barn within the front yard setback, creating a difficulty if that barn had to be removed, but then asserts that difficulty can be avoided by keeping the pole barn it that location.

I find that the Code does not allow the Applicant to take this approach. The Code is intended to address difficulties that exist prior to a development by allowing the development to work around those difficulties; the Code is not intended to address difficulties that are created by the development itself and that arise only after the development has been constructed. To adopt the Applicant's position would create an untenable situation where any property owner could construct a non-conforming development and then use the existence of that development as the basis for seeking a variance that allows the development to remain, no matter how egregious or benign the nonconformity, as long as the expense of correcting the nonconformity is large enough. I therefore find that the Area Variance as requested does not meet this criterion because no practical difficulties exist at all as contemplated by this Code provision.

In the alternative, even if the existing pole barn itself can be viewed as the practical difficulty, I find that the Applicant has not met its burden of demonstrating that the private expense that will result is greater than the public benefit. The Applicant has offered several different estimates of the costs of removing and relocating the entire pole barn – estimates that range from $400,000, as presented in the Application, to $160,000, as presented during the Hearing, to $250,000, as described in the Applicant's Supplemental Burden of Proof Statement. Because the Applicant's own estimates changed over time, it is difficult to determine the precise amount of the expected private expenses. I find the amount presented most recently ($250,000, consisting of the $60,000 demolition cost and $190,000 replacement cost) to be the appropriate cost for purposes of applying this Code provision. In terms of public benefits, the application of the front yard setback largely promotes public benefits related to safety and to neighborhood aesthetics. The Staff Report indicates that the setback also provides a public benefit by allowing for potential expansion of the right of way, should traffic demand be greater in the future. Several participants in this proceeding testified that they had concerns over safety (especially in light of the alignment of the road at this location) and the aesthetic drawbacks of having such a large structure that close to the road and to other homes, thereby altering the character of the neighborhood. This testimony was provided as a means of demonstrating that the public benefits are not outweighed by the private expense of removing and relocating the pole barn.

I also find that the Applicant has not provided evidence sufficient to conclude that full-scale removal and relocation of the pole barn is necessary. During the Hearing, the Applicant did state that the foundation of the building was placed in a manner that it could not simply be re-used. However, the Applicant apparently had not considered other alternatives that could reduce costs like constructing a smaller structure. While it may not be desirable to the Applicant to have a smaller pole barn, the Applicant has not attempted to explain why only the currently-existing pole barn can be reconstructed.

The Hearings Officer finds it difficult, based on the current record, to compare the raw dollar costs of the removal and replacement of the pole barn to the non-monetary public benefits related to safety and aesthetics. The burden of making that comparison and showing that private expenses are greater than the public benefit, however, lies with the Applicant. The Applicant has not attempted to make that comparison, instead positing that "there is little to no public benefit to moving the building."[2] In light of the lack of evidence that the costs of removal and replacement as described are necessary, and without analysis by the Applicant that those costs outweigh the value of the public benefits of the front yard setback that do exist, I find the Applicant has not met its burden of proving that the literal application of the ordinance would create practical difficulties resulting in greater private expense than public benefit. The Application therefore does not meet this criterion.

[2] This also distinguishes the present matter from an earlier decision the Applicant relies on, County file 247-20-00201-V. In that case, the County granted a variance in a similar situation. However, in that case the structure had been in place for years, and there was no comment in that proceeding from others establishing that there was any public benefit to enforcing the setback. The hearings officer in that case therefore had a different record on which to compare private expenses to public benefits and was able to come to a different conclusion than I can here.

2. *That the condition creating the difficulty is not general throughout the surrounding area but is unique to the applicant's site.*

FINDING: DCC 18.132.020(A)(2) is similar to DCC 18.132.020(A)(1) in that it requires a determination of what difficulty is being addressed by the Area Variance. Once that difficulty is identified, the condition creating the difficulty must also be identified and it must be determined whether that condition is unique to the Subject Property.

In the findings related to DCC 18.132.020(A)(1), I concluded that the Applicant faces no difficulties from the literal application of the front yard setback. As a result, there are no conditions creating a difficulty and, therefore, this criterion is not met and the Area Variance cannot be approved.

In the alternative findings related to DCC 18.132.020(A)(1), I addressed the Applicant's assertion that the difficulties that exist are the difficulties in removing and relocating the pole barn if the front yard setback is strictly applied. Thus, and only in the alternative, I address whether the condition creating those difficulties are unique to the Subject Property. I find that they are not.

Again, according to the Applicant, the difficulties it faces are the need to remove and relocate the pole barn. According to a statement from the Applicant's representative during the Hearing, the primary condition that created those difficulties was "human error" and, more precisely, the Applicant's reliance on its contractor to determine the location of the required setback. But the Applicant has not provided evidence sufficient to conclude that this condition – human error – is unique to the Subject Property. Indeed, the prior decision the Applicant relies on, and others decisions Staff submitted to the record, show that human error can occur on many types of sites. Moreover, I agree with the reasoning of the Hearings Officer in County file V-01-11, *Edwards*, in which the Hearings Officer concluded that, in the context of DCC 18.132.020(A)(2), the "condition creating the difficulty" necessarily applies to the physical characteristics of the subject property. The context referred to is this Code provision's references to the "site" and to the "surrounding area." The reference to restrictions on the "site" also appears in DCC 18.132.020(A)(3). I find no basis in the Code to extend this site-based context to include conditions that are created by the person developing the site. I therefore find that the Applicant has not met its burden to show that any conditions necessitating the requested Area Variance are unique to the Subject Property.

3. *That the condition was not created by the applicant. A self created difficulty will be found if the applicant knew or should have known of the restriction at the time the site was purchased.*

FINDING: Similar to my findings related to DCC 18.132.020(A)(1) and DCC 18.132.020(A)(2), I find that this criterion is not met. In those findings, I concluded that the Applicant faces no difficulties from the literal application of the front yard setback and, as a result, there are no conditions creating a difficulty Because there are no conditions creating a difficulty, the Applicant cannot meet its burden to show that it did not create such a condition, and the Area Variance cannot be approved.

In the alternative findings related to DCC 18.132.020(A)(1) and DCC 18.132.020(A)(2), I addressed the Applicant's assertion that there are practical difficulties from a strict application of the front yard setback (removing and replacing the pole barn) and that the conditions causing those difficulties (human error and reliance on a contractor) are unique to the Subject Property. Thus, and only in the alternative, I address whether the Applicant created those conditions.

During the Hearing, the Applicant's representative asserted that the Applicant here – specifically Robin and William Delaney – did not cause the setback error because they relied on the expertise of their contractor who, they claim, was responsible for the error. This argument relies on a presumption that the Code distinguishes an "applicant" from anyone acting on behalf of an applicant. I find no such basis in the Code to arrive at that conclusion. Nor does the record support that conclusion in this particular proceeding.

In general, the Code is structured in a way that centers around the owner of a property as the primary actor for the development of property. DCC 22.08.010(B)(1), for example, requires that any application for development or land use action must be submitted by the property owner "or a person who has written authorization from the property owner." Similarly, DCC 18.04.030 defines "owner" as the owner of the property "or the authorized agent thereof." In other words, the Code contemplates that different actor may appear during the process but, ultimately, the development of a property occurs at the request of, or through the consent of, the property owner. Here, the Applicant is the property owner. But even when others were acting, like when the Applicant's contractor obtained the building permit and revised the site plan, those others were acting at the behest of the Applicant.

Based on the evidence in the record, it is also clear that Mr. Delaney, as both Owner and Applicant, was very involved in the process. Mr. Delany indicates that he personally presented the development proposal to his Homeowner's Association. He also acknowledged being part of multiple conversations when the various participants were trying to determine if the pole barn was in compliance with the setback requirements. There is not dispute the Applicant contracted with a contractor to construct the pole barn. The copy of the contract the Applicant submitted to the record includes the scope of work for the contractor. It is not clear if that scope of work includes obtaining any sort of survey on which the setbacks could be measured or any other obligation to make those measurements. However, such a determination is not necessary. Either the Applicant contracted to have such work performed on its behalf, or it retained that obligation for itself. Ultimately, prior to construction of the pole barn, that work was either not performed for the Applicant, or was done in error on behalf of the Applicant. Finally, on December 22, 2020, the Applicant became aware that the pole barn was likely within the front yard setback, if only by one foot. A minor variance would be required in that situation. Rather than seek that variance pursuant to DCC 18.132.025, however, the Applicant allowed construction of the pole barn to continue. Not only did the Applicant never seek that variance, it allowed its contractor to submit a new site plan showing a greater setback (21 feet) than the original setback and which apparently was not an accurate depiction of the then-existing building, which has now been determined to be as close as 14.2 feet from the street. It was the Applicant's decision to proceed with the construction at that point even though a survey had still not yet been conducted.

Based on the foregoing, I find that the Applicant, personally and through those acting on the Applicant's behalf, caused the difficulty the Applicant seeks to avoid with the Area Variance. This criterion is therefore not met.

4. That the variance conforms to the Comprehensive Plan and the intent of the ordinance being varied.

FINDING: As noted in the Staff Report, neither the Comprehensive Plan nor the Code has any express language as to intent of setbacks in the RR-10 Zone. The record indicates that the setback contributes to the rural residential aesthetic described as the purpose of the RR-10 zone in both the Comprehensive Plan and Code, and that it has public benefits related to safety by reducing conflicts with uses in the adjacent road right-of-way.

While it is possible that the requested Area Variance can conform to the Comprehensive Plan and the intent of the ordinance being varied, I have found that the Area Variance is not available in this situation and, therefore, no findings are necessary for this criterion.

IV. CONCLUSION

Based on the foregoing findings, the request for the Area Variance is DENIED.

Dated this 20th day of September 2021

Tommy A. Brooks
Deschutes County Hearings Officer