STAFF REPORT

FILE NUMBER(S): 247-23-000444-LM, 659-V

SUBJECT PROPERTY/ OWNER:
Mailing Name: BAILEY LIVING TRUST
Map and Taxlot: 211003DC02600
Account: 126842
Situs Address: 16299 BEAR LN, BEND, OR 97707

APPLICANT: Jeff Bailey

REQUEST: The applicant requests an Area Variance to the 20-foot front yard setback for an existing accessory structure that does not comply with this requirement.

HEARING DATE: October 18, 2023

HEARING LOCATION:
Videoconference (Zoom) and
Barnes & Sawyer Rooms
Deschutes Services Center
1300 NW Wall Street
Bend, OR 97708

ZOOM LINK: https://us02web.zoom.us/j/88010943495

STAFF CONTACT:
Ben Wilson, Assistant Planner
Phone: 541-385-1713
Email: Ben.Wilson@deschutes.org

RECORD: Record items can be viewed and downloaded from:
www.deschutes.org/baileysetbackvariance

I. APPLICABLE CRITERIA

Deschutes County Code (DCC)
Title 18, Deschutes County Zoning Ordinance

Chapter 18.60, Rural Residential Zone (RR10)
Chapter 18.84, Landscape Management Combining Zone (LM)
Chapter 18.88, Wildlife Area Combining Zone (WA)
Chapter 18.96, Flood Plain Zone (FP)
Chapter 18.132, Variances
Title 22, Deschutes County Development Procedures Ordinance
Chapter 22.20 Review of Land Use Action Applications

II. BASIC FINDINGS

LOT OF RECORD: The subject property is a legal lot of record as it is platted as Lot 71, Block 63, of the Deschutes River Recreation Homesites Unit 6 Part I subdivision.

SITE DESCRIPTION: The subject 0.75-acre property is developed with single-family dwelling and detached accessory structure. The property is relatively flat and contains mature trees and other vegetation throughout. The property is rectangular in shape and gains access from Bear Lane.

REVIEW PERIOD: The subject applications were submitted on separate dates. Land use file 247-23-000444-LM was submitted on May 31, 2023.. Staff notes an incomplete letter for this application was sent to the applicant on June 27, 2023. However, due to a mailing error, the applicant did not receive the correct incomplete letter until July 28, 2023. For this reason, the application was deemed complete on June 30, 2023. The 150th day on which the County must take final action on this application is November 27, 2023.

Land use file 247-23-000659-V was submitted on September 6, 2023, and deemed complete by the Planning Division on October 5, 2023. The 150th day on which the County must take final action on this application is March 3, 2024.

PROPOSAL: The applicant proposes to establish a single-family dwelling addition, which would connect the existing dwelling to the accessory structure located near the front of the subject property. The applicant is also requesting an Area Variance to the 20-foot front yard setback for the existing accessory structure that does not meet this requirement.

PUBLIC AGENCY COMMENTS: The Planning Division mailed notice on September 15, 2023, to several public agencies and did not receive any comments.

PUBLIC COMMENTS: The Planning Division mailed notice of the Variance application to all property owners within 250 feet of the subject property on September 15, 2023. The applicant also complied with the posted notice requirements of Section 22.24.030(B) of Title 22. The applicant submitted a Land Use Action Sign Affidavit indicating the applicant posted notice of the land use action on September 18, 2023. No public comments were received.

III. FINDINGS & CONCLUSIONS

Title 18 of the Deschutes County Code, County Zoning

Chapter 18.60, Rural Residential Zone (RR-10)

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 applicant is proposing an addition to an existing single-family dwelling. Single-family dwellings, manufactured homes, residential accessory structures, and additions to these structures are permitted outright in the RR-10 Zone. No manufactured homes are proposed.

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.

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: The proposed structure must comply with setbacks in sections (A) through (C). As a condition of approval, structural setbacks from any north lot line shall meet the solar setback requirements in DCC 18.116.180. 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. The applicant is proposing a single-family dwelling addition that would connect the existing dwelling and detached garage. Staff notes the existing garage located at the front of the property does not meet the 20-foot front yard setback requirement. For this reason, the applicant has requested a variance to the 20-foot front yard setback requirement. Subsequent findings are discussed below.

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: All sewage disposal installations, structures, buildings or similar permanent fixtures will 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.

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: Proposed and existing structures, if any, located on the subject property will not, cumulatively, cover in excess of 30 percent of the total lot area.

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 elevation drawings submitted with the application indicate the overall height of the structure(s) will be 30 feet or less in height. As a condition of approval, no building or structure shall be erected or enlarged to exceed 30 feet in height, except as allowed by DCC 18.120.040.

Section 18.60.080. Rimrock Setback.

Setbacks from rimrock shall be as provided in DCC 18.116.160.

FINDING: There is no rimrock in the project vicinity.

Chapter 18.84, Landscape Management Combining Zone (LM)

Section 18.84.020. Application of Provisions.

The provisions of DCC 18.84 shall apply to all areas within one-fourth mile of roads identified as landscape management corridors in the Comprehensive Plan and the County Zoning Map. The provisions of DCC 18.84 shall also apply to all areas within the boundaries of a State scenic waterway or Federal wild and scenic river corridor and all areas within

660 feet of rivers and streams otherwise identified as landscape management corridors in the comprehensive plan and the County Zoning Map. The distance specified above shall be measured horizontally from the center line of designated landscape management roadways or from the nearest ordinary high water mark of a designated landscape management river or stream. The limitations in DCC 18.84.20 shall not unduly restrict accepted agricultural practices.

FINDING: The Deschutes River is identified on the County Zoning Map as the landscape management feature. The subject property falls within the Landscape Management Combining Zone for this feature, therefore, the provisions of this chapter apply.

Section 18.84.030. Uses Permitted Outright.

Uses permitted in the underlying zone with which the LM Zone is combined shall be permitted in the LM Zone, subject to the provisions in DCC 18.84.

FINDING: As discussed herein, the proposed use is allowed outright in the underlying zone.

Section 18.84.050. Use Limitations.

A. Any new structure or substantial exterior alteration of a structure requiring a building permit or an agricultural structure within an LM Zone shall obtain site plan approval in accordance with DCC 18.84 prior to construction. As used in DCC 18.84 substantial exterior alteration consists of an alteration which exceeds 25 percent in the size or 25 percent of the assessed value of the structure.

FINDING: The proposed structure(s) require building permits and/or proposed additions constitute substantial alterations under this criterion.

Section 18.84.080. Design review standards.

The following standards will be used to evaluate the proposed site plan:

A. Except as necessary for construction of access roads, building pads, septic drainfields, public utility easements, parking areas, etc., the existing tree and shrub cover screening the development from the designated road, river, or stream shall be retained. This provision does not prohibit maintenance of existing lawns, removal of dead, diseased or hazardous vegetation; the commercial harvest of forest products in accordance with the Oregon Forest Practices Act, or agricultural use of the land.

FINDING: The proposal, as conditioned, will comply with this criterion.

B. It is recommended that new structures and additions to existing structures be finished in muted earth tones that blend with and reduce contrast with the surrounding vegetation and landscape of the building site.

C. No large areas, including roofs, shall be finished with white, bright or reflective materials. Roofing, including metal roofing, shall be non-reflective and of a color which blends with the surrounding vegetation and landscape. DCC 18.84.080 shall not apply to attached additions to structures lawfully in existence on April 8, 1992, unless substantial improvement to the roof of the existing structure occurs.

FINDING: The applicant has proposed a green roof and natural wood finish as part of the application. Staff finds that the proposed muted earth tone colors blend with and reduce contrast with the surrounding vegetation and landscape of the building site, and that no large areas, including roofs, will be finished with white, bright, or reflective materials.

D. Subject to applicable rimrock setback requirements or rimrock setback exception standards in DCC 18. 84.090(E), all structures shall be sited to take advantage of existing vegetation, trees and topographic features in order to reduce visual impact as seen from the designated road, river or stream. When more than one nonagricultural structure is to exist and no vegetation, trees or topographic features exist which can reduce visual impact of the subject structure, such structure shall be clustered in a manner which reduces their visual impact as seen from the designated road, river, or stream.

FINDING: The proposed structure(s) will be sited to take advantage of existing vegetation, trees and topographic features in order to reduce visual impact as seen from the designated road, river or stream.

E. Structures shall not exceed 30 feet in height measured from the natural grade on the side(s) facing the road, river or stream. Within the LM Zone along a state scenic waterway or federal wild and scenic river, the height of a structure shall include chimneys, antennas, flag poles or other projections from the roof of the structure. DCC 18.84.080(E) shall not apply to agricultural structures located at least 50 feet from a rimrock.

FINDING: Staff includes this requirement as a condition of approval.

F. New residential or commercial driveway access to designated landscape management roads shall be consolidated wherever possible.

FINDING: No new residential or commercial driveway access to designated landscape management roads is proposed.

G. New exterior lighting, including security lighting, shall be sited and shielded so that it is directed downward and is not directly visible from the designated road, river or stream.

FINDING: Staff includes this requirement as a condition of approval.

H. The Planning Director or Hearings Body may require the establishment of introduced landscape material to screen the development, assure compatibility with existing vegetation, reduce glare, direct automobile and pedestrian circulation or enhance the overall appearance of the development while not interfering with the views of oncoming traffic at access points, or views of mountains, forests and other open and scenic areas as seen from the designated landscape management road, river or stream. Use of native species shall be encouraged. (Formerly section 18.84.080 (C))

FINDING: No introduced landscape material is required under this criterion.

I. No signs or other forms of outdoor advertising that are visible from a designated landscape management river or stream shall be permitted. Property protection signs (No Trespassing, No Hunting, etc.,) are permitted.

FINDING: No signs or other forms of outdoor advertising that are visible from a designated Landscape Management river or stream are proposed.

J. A conservation easement as defined in DCC 18.04.280 "Conservation Easement" and specified in DCC 18.116.220 shall be required as a condition of approval for all landscape management site plans involving property adjacent to the Deschutes River, Crooked River, Fall River, Little Deschutes River, Spring River, Whychus Creek and Tumalo Creek. Conservation easements required as a condition of landscape management site plans shall not require public access.

FINDING: This conservation easement has been previously recorded.

Section 18.84.090. Setbacks.

A. Except as provided in DCC 18.84.090, minimum setbacks shall be those established in the underlying zone with which the LM Zone is combined.

FINDING: Compliance with the setbacks established in the underlying zone with which the LM Zone is combined is reviewed herein.

B. Road Setbacks. All new structures or additions to existing structures on lots fronting a designated landscape management road shall be set back at least 100 feet from the edge of the designated road right-of-way unless the Planning Director or Hearings Body finds that:

1. A location closer to the designated road would more effectively screen the building from the road; or protect a distant vista; or

2. The depth of the lot makes a 100-foot setback not feasible; or

3. Buildings on both lots abutting the subject lot have front yard setbacks of less than 100 feet and the adjacent buildings are within 100 feet of the lot line of the subject property, and the depth of the front yard is not less than the average depth of the front yards of the abutting lots.

If the above findings are made, the Planning Director or Hearings Body may approve a less restrictive front yard setback which will be appropriate to carry out the purpose of the zone.

FINDING: The subject property does not front on a designated Landscape Management road.

C. River and Stream Setbacks. All new structures or additions to existing structures shall be set back 100 feet from the ordinary high water mark of designated streams and rivers or obtain a setback exception in accordance with DCC 18.120.030. For the purpose of DCC 18.84.090, decks are considered part of a structure and must conform with the setback requirement.

The placement of on-site sewage disposal systems shall be subject to joint review by the Planning Director or Hearings Body and the Deschutes County Environmental Health Division. The placement of such systems shall minimize the impact on the vegetation along the river and shall allow a dwelling to be constructed on the site as far from the stream or lake as possible. Sand filter systems may be required as replacement systems when this will allow a dwelling to be located further from the stream or to meet the 100-foot setback requirement

FINDING: The application materials indicate that all new structures, additions to existing structures, sewage disposal systems, and/or decks will be set back at least 100 feet from the ordinary high water mark of designated streams and rivers.

D. Rimrock Setback. New structures (including decks or additions to existing structures) shall be set back 50 feet from the rimrock in an LM Zone. An exception to this setback may be granted pursuant to the provisions of DCC 18.84.090(E).

FINDING: There is no rimrock in the project vicinity.

Section 18.84.095. Scenic waterway.

Approval of all structures in a State Scenic Waterway shall be conditioned upon receipt of approval of the Oregon Department of Parks and Recreation.

FINDING: The proposed structure(s) are located in a State Scenic Waterway. The applicant shall receive approval from the State Parks Department prior to beginning construction.

Chapter 18.88, Wildlife Area Combining Zone (WA)

Section 18.88.030. Uses Permitted Outright.

In a zone with which the WA Zone is combined, the uses permitted outright shall be those permitted outright by the underlying zone.

FINDING: As discussed above, the proposed use is allowed outright in the underlying zone.

Section 18.88.060. Siting Standards.

A. Setbacks shall be those described in the underlying zone with which the WA Zone is combined.

B. The footprint, including decks and porches, for new dwellings shall be located entirely within 300 feet of public roads, private roads or recorded easements for vehicular access existing as of August 5, 1992 unless it can be found that:

1. Habitat values (i.e., browse, forage, cover, access to water) and migration corridors are afforded equal or greater protection through a different development pattern; or,

2. The siting within 300 feet of such roads or easements for vehicular access would force the dwelling to be located on irrigated land, in which case, the dwelling shall be located to provide the least possible impact on wildlife habitat considering browse, forage, cover, access to water and migration corridors, and minimizing length of new access roads and driveways; or,

3. The dwelling is set back no more than 50 feet from the edge of a driveway that existed as of August 5, 1992.

C. For purposes of DCC 18.88.060(B):

1. A private road, easement for vehicular access or driveway will conclusively be regarded as having existed prior to August 5, 1992 if the applicant submits any of the following:

a. A copy of an easement recorded with the County Clerk prior to August 5, 1992 establishing a right of ingress and egress for vehicular use;

b. An aerial photograph with proof that it was taken prior to August 5, 1992 on which the road, easement or driveway allowing vehicular access is visible;

c. A map published prior to August 5, 1992 or assessor's map from prior to August 5, 1992 showing the road (but not showing a mere trail or footpath).

2. An applicant may submit any other evidence thought to establish the existence of a private road, easement for vehicular access or driveway as of August 5, 1992 which evidence need not be regarded as conclusive.

FINDING: Setbacks are those described in the underlying zone with which the WA Zone is combined. No new dwelling is proposed. Therefore, the criteria under subsection (B) do not apply.

Section 18.88.070. Fencing Standards.

The following fencing provisions shall apply as a condition of approval for any new fences constructed as a part of development of a property in conjunction with a conditional use permit or site plan review.

A. New fences in the Wildlife Area Combining Zone shall be designed to permit wildlife passage. The following standards and guidelines shall apply unless an alternative

fence design which provides equivalent wildlife passage is approved by the County after consultation with the Oregon Department of Fish and Wildlife:

1. ***The distance between the ground and the bottom strand or board of the fence shall be at least 15 inches.***
2. ***The height of the fence shall not exceed 48 inches above ground level.***
3. ***Smooth wire and wooden fences that allow passage of wildlife are preferred. Woven wire fences are discouraged.***

B. Exemptions:

1. ***Fences encompassing less than 10,000 square feet which surround or are adjacent to residences or structures are exempt from the above fencing standards.***
2. ***Corrals used for working livestock.***

FINDING: No new fencing is included in this proposal. As a condition of approval, all new fences shall comply with DCC 18.88.070.

Chapter 18.96, Flood Plain (FP) Zone

Section 18.96.020, Designated Areas.

The areas of special flood hazard identified by the Federal Insurance Administration in a scientific and engineering report entitled "Flood Insurance Study for Deschutes County, Oregon and Incorporated Areas" revised September 28, 2007, with accompanying Flood Insurance Rate Maps is hereby adopted by reference and incorporated herein by this reference. The Flood Insurance Study is on file at the Deschutes County Community Development Department.

The Flood Plain Zone shall include all areas designated as "Special Flood Hazard Areas" by the Flood Insurance Study for Deschutes County. When base flood elevation data has not been provided in the Flood Insurance Study, the Planning Director will obtain, review and reasonably utilize any base flood elevation or floodway data available from federal, state or other sources, in determining the location of a flood plain or floodway.

FINDING: The Deschutes County Flood Plain Zone includes all areas designated as "Special Flood Hazard Areas" on the Federal Flood Insurance Rate Maps (FIRM). Special Flood Hazards Areas are lands that would be inundated by a 100-year flood event, that are at or below the base flood elevation (BFE). The flood map for this property is FIRM No. 41017C1140D, Effective Date: September 28, 2007. Based on the figure below, staff notes that the proposed development is not located within the Flood Plain Zone, therefore the provisions of this chapter to not apply.

Figure 1 – Flood Plain Zone

Chapter 18.132, Variances

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.

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 ordinance requires a 20-foot setback from the front property line. Deschutes County Hearings Officer decision 247-21-000183-V provides guidance on how this criterion should be addressed. Staff includes a copy of this decision as an attachment to this staff report. This criterion intends to address practical difficulties caused by the ordinance that exist prior to development, not created by the development itself. At the time of approval, the applicant demonstrated they not only could meet the setback requirement at the time of development, they exceeded it, proposing a 35-foot setback from the front property line. This was confirmed in a County land use decision and was further approved by the building permit for this structure. Staff finds the applicant did not identify any practical difficulties that would have prevented the structure from meeting the setback requirement, but rather focuses on the difficulty of removing or relocating the structure. For this reason, it is unclear to staff what practical difficulty is being presented by the applicant that would have prevented the structure from meeting the setback requirement.

In relation to the public benefit, it is understood that setbacks are established for public safety reasons and neighborhood aesthetics. Additionally, setbacks allow for potential road right-of-way expansion if traffic demands increase. Staff finds the applicant's burden of proof addresses the

impacts associated with keeping the structure in the front yard setback, but does not demonstrate how the private expense outweighs the public benefit. The applicant provides two separate cost estimates associated with resolving the issue. If the issue had been discovered at the time of construction, estimates range from $40,000-$50,000. Now that the structure has been constructed, the applicant estimates it would cost anywhere between $80,000-$100,000. While the applicant provided information relating to private expense and public benefit, they did not present an argument comparing the two. For this reason, it is unclear if this criterion can be met.

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

FINDING: The applicant provides the following addressing this criterion:

> Based on conversations with the Builder of the accessory structure (Jim Engalls of RR Builders), construction of the structure began in winter and the location of the foundation was based on the plowed edge of the road. This creates a condition unique to this particular property as the plowing of the road can often vary along street frontages.

Staff identifies two key issues with the applicant's argument. First, this does not appear to be a condition unique to the applicant's site. It is reasonable to assume that snow and snow removal occurs in a similar nature along Bear Lane and does not specifically create a difficulty unique to the site.

Second, front yard setbacks are not measured from the road edge but rather from the property line, which due to the public right-of-way, do not coincide. Staff finds it unreasonable to argue that the presence of plowed snow is the condition creating the difficulty to the site. This appears to staff to be human error rather than a unique characteristic of the site. As referenced in the Hearings Officer decision cited above, this criterion requires the applicant to demonstrate a difficulty that is unique to their site; implying that it must be a physical characteristic. For these reasons, it is unclear if the applicant's burden of proof adequately addresses this criterion.

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: In the applicant's burden of proof, they rely on a statement from the Builder that the Building Inspector reviewed and approved all setbacks at the time of the foundation inspection. Staff included in the record an email[1] from the Deschutes County Building Official stating that Building Inspectors do not verify setbacks as they are not qualified surveyors.

Additionally, staff finds the applicant was aware of the required setback as they were the applicant for a land use permit that ultimately approved the structure at a 35-foot front yard setback. The applicant argues that the condition was not created by them, but their contractor who ultimately measured the setback from the road edge rather than the property line. In the Hearings Officer

[1] Reference email from Randy Scheid, dated September 12, 2023.

decision cited above, the Hearings Officer found that the code does not make a distinction between the applicant and anyone acting on behalf of the applicant. In this case, the contractor was acting on behalf of the applicant as an authorized representative. For these reasons, it is unclear if the applicant's burden of proof adequately addresses this criterion.

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

FINDING: The Comprehensive Plan, along with its goals and policies, are carried out via the Zoning Code. If the proposal cannot meet the requirements of the Deschutes County Code, it is unclear to staff if the variance conforms to the Comprehensive Plan and the intent of the ordinance being varied.

Title 22, Deschutes County Development Procedures Ordinance

Chapter 22.20 Review of Land Use Action Applications

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.

E. Public Health and Safety.

1. For the purposes of this section, public health and safety means the actions authorized by the permit would cause abatement of conditions found to exist on the property that endanger life, health, personal property, or safety of the residents of the property or the public.

2. Examples of that situation include, but are not limited to issuance of permits to replace faulty electrical wiring, repair or install furnace equipment; roof repairs; replace or repair compromised utility infrastructure for water, sewer, fuel or power; and actions necessary to stop earth slope failure.

FINDING: The Board provided interpretive guidance to all Deschutes County Hearings Bodies related to DCC 22.20.015 in *Tumalo Irrigation District* (247-17-000775-ZC, 247-17-000776-PA). The Hearings Officer finds the following Board comments to be relevant to this case and decision:

> "As DCC 22.20.015 is a relatively new provision first adopted in 2015 and frequently arises in contested land use hearings, the Board takes this opportunity to provide interpretation and guidance on the implementation of this provision.
>
> As discussed more fully below, the Board interprets DCC 22.20.015 to require a sequential three-step analysis.
>
> 1. Is there a previously "adjudicated violation" on the property?
> 2. Does the subject land use application present the best forum for adjudicating a new allegation, i.e. is there time to investigate something more than a vague allegation?
> 3. When there is an "adjudicated violation" or the property is found to be in violation as part of the land use application process, can the land use permit nevertheless be issued pursuant to DCC 22.20.015(D) and (E)?
>
> First, the Board starts by noting that the primary purpose (and benefit) of DCC 22.20.015 is to address "adjudicated violations," i.e. violations that were already conclusively determined through the normal applicable code enforcement process prior to an applicant submitting a land use application. This interpretation is supported by the use of the past tense in the codified definition of "violation" in DCC 22.20.015(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 an acknowledgment by the alleged violator in a signed voluntary compliance agreement ('VCA')" (emphasis added).
>
> Second, differing from the "adjudicated violations" scenario described above, there are cases where the Board anticipates that a County hearings body will need to determine if a property is in violation during the land use application process. DCC 22.20.015(C) addresses this

possibility by including in the definition of "violation" the phrase "or through the review process of the current application." However, the Board cautions that County hearings bodies should take up this inquiry in rare cases because of the obvious practical difficulties born from comingling the County's land use application process with the separate and distinct code enforcement process. For example, when a vague allegation is alleged by an opponent late in the land use application process, there rarely will be time to comprehensively investigate and appropriately adjudicate that violation due to the 150-day time limit for issuing final decisions per ORS 215.427. Nothing within DCC 22.20.015 requires a County hearings body to process a code complaint pursuant to the County's adopted Code Enforcement Policy and Procedures Manual and conclusively determine the status of a previously un-adjudicated violation solely on the basis that an opponent submits a vague and unsubstantiated allegation during the land use application process.

As such, the Board interprets DCC 22.20.015 to require something more than a vague allegation (i.e., clear evidence of a violation) to compel the County hearings body to determine if a property is in violation and the pending land use application process is the appropriate forum in which to determine whether a violation exists. As discussed below, this case does not provide a sufficient basis for determining what more is needed and the Board thereby will wait for a subsequent case to establish a bright-line rule. Further, prior to electing to adjudicate an allegation as part of the land use application process, the Board interprets DCC 22.20.015 as necessitating the County hearings body to likewise consider procedural, equitable, and legal issues, including but not limited to the time it will take to conduct an investigation pursuant to the Code Enforcement Policy and Procedures Manual, the severity of the alleged violation (i.e., clear cutting vegetation in a wetland is severe while minimal solid waste that is not creating a public health hazard is not), and the 150-day land use decision making clock.

Third, the Board takes this opportunity to reiterate what is self-evident in DCC 22.20.015. A County hearings body's inquiry is not completed by simply noting a past "adjudicated violation" or finding that a property is in violation. DCC 22.20.015(D) and (E) compel a subsequent analysis to determine, for example, if the permit "protect[s] the public health and safety" or "results in the property coming into full compliance." Further, the final phrase of DCC 22.20.015(D)(1) notes that "coming into full compliance" also "include[s] sequencing of permits or other approvals as part of a voluntary compliance agreement." The Board thereby interprets that aforementioned language to specifically allow a County hearings body to approve a land use permit conditioned on the applicant subsequently executing and complying with a voluntary compliance agreement even for an unrelated violation on the same property."

FINDING: Staff finds that the record includes the applicant's confirmation that the required front yard setback is not met. For this reason, staff finds it is not a mere allegation of a violation. Based on the above guidance, staff asks the Hearings Officer to determine whether this proceeding is the correct venue to adjudicate the violation.

IV. CONCLUSION

Based on the foregoing findings, it is unclear to staff if the proposal warrants granting an area variance. Staff finds the proposal meets other relevant criteria associated with the Rural Residential Zone, the Landscape Management Combining Zone, the Wildlife Area Combining Zone, and the Floodplain Zone. Should the Hearings Officer approve the applications, staff recommends the Conditions of Approval listed below.

Other permits may be required. The applicants are responsible for obtaining any necessary permits from the Deschutes County Building Division and Deschutes County Environmental Soils Division as well as any required state and federal permits.

V. RECOMMENDED CONDITIONS OF APPROVAL

A. This approval is based upon the application, site plan, specifications, and supporting documentation submitted by the applicant. Any substantial change in this approved use will require review through a new land use application.

B. The property owner shall obtain any necessary permits from the Deschutes County Building Division and Environmental Soils Division.

C. No building or structure shall be erected or enlarged to exceed 30 feet in height, except as allowed by DCC 18.120.040

D. Structural setbacks from any north lot line shall meet the solar setback requirements in DCC 18.116.180.

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.

F. Except as necessary for construction of access roads, building pads, septic drainfields, public utility easements, parking areas, etc., the existing tree and shrub cover screening the development from the designated road, river, or stream shall be retained. This provision does not prohibit maintenance of existing lawns, removal of dead, diseased or hazardous vegetation; the commercial harvest of forest products in accordance with the Oregon Forest Practices Act, or agricultural use of the land."

G. Structures shall not exceed 30 feet in height measured from the natural grade on the side(s) facing the road, river or stream.

H. New exterior lighting, including security lighting, shall be sited and shielded so that it is directed downward and is not directly visible from the Landscape Management designated road, river or stream.

I. The owner shall receive approval from the State Parks Department for the proposed structure(s).

J. All new fences shall comply with DCC 18.88.070.

VII. DURATION OF APPROVAL, NOTICE, AND APPEALS

The applicant shall initiate the use for the proposed development within two (2) years of the date this decision becomes final, or obtain approval of an extension under Title 22 of the County Code, or this approval shall be void.

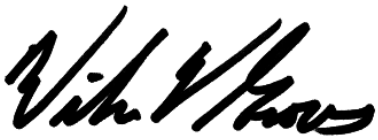
This decision becomes final twelve (12) days after the date mailed, unless appealed by a party of interest. To appeal, it is necessary to submit a Notice of Appeal, the appeal fee of $250.00 and a statement raising any issue relied upon for appeal with sufficient specificity to afford the Hearings Body an adequate opportunity to respond to and resolve each issue.

Copies of the application, all documents and evidence submitted by or on behalf of the applicant and applicable criteria are available for inspection at no cost. Copies can be purchased for 25 cents per page.

NOTICE TO MORTGAGEE, LIEN HOLDER, VENDOR OR SELLER: ORS CHAPTER 215 REQUIRES THAT IF YOU RECEIVE THIS NOTICE, IT MUST BE PROMPTLY FORWARDED TO THE PURCHASER.

DESCHUTES COUNTY PLANNING DIVISION

Written by: Ben Wilson, Assistant Planner



Reviewed by: Will Groves, Planning Manager

Attachment(s): Site Plan
Hearings Officer Decision 247-21-000183-V

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