



AGENDA

**DESCHUTES COUNTY HEARINGS OFFICER
JULY 20, 2021, 6:00 PM
BARNES SAWYER ROOMS
DESCHUTES SERVICES CENTER
1300 NW WALL STREET BEND, OR, 97703**

Public Hearing

I. Hearings Officer Hearings

FILE NUMBERS: 247-21-000183-V

OWNER/APPLICANT: Robin Delaney

REQUEST: An Area Variance to the front yard setback requirement for an accessory building in the Rural Residential Zone

LOCATION: 15780 Tumble Weed Turn, Sisters

STAFF CONTACT: Cynthia Smidt, Associate Planner

Deschutes County encourages persons with disabilities to participate in all programs and activities. This event/location is accessible to people with disabilities. If you need accommodations to make participation possible, please call (541) 617-4747.



COMMUNITY DEVELOPMENT

FINDINGS AND DECISION

FILE NUMBER: 247-21-000183-V

HEARING DATE: July 20, 2021, 6:00 p.m.

HEARING LOCATION: Barnes and Sawyer Hearing Rooms¹
Deschutes Service Center
1300 NW Wall Street
Bend, OR 97701

SUBJECT PROPERTY/ OWNER: Mailing Name: DELANEY, ROBIN R
Map and Taxlot: 141028C002700
Account: 142931
Situs Address: 15780 TUMBLE WEED TURN, SISTERS, OR 97759

APPLICANT: Robin Delaney²

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). The accessory structure (pole building) currently exists on the property through the issuance of building permit 247-20-006829-STR.

STAFF CONTACT: Cynthia Smidt, Associate Planner
Phone: (541) 317-3150
Email: Cynthia.Smidt@deschutes.org

DOCUMENTS: Can be viewed and downloaded from <http://dial.deschutes.org> and www.buildingpermits.oregon.gov

¹ The public hearing will also be conducted virtually via Zoom through the following web links and phone numbers: <https://us02web.zoom.us/j/89529936081?pwd=Wm5mdmlrSDFwSTJtelpsc1M0dDdQUt09> or telephone number 1-253-215-8782. When prompted, enter the following Webinar ID: 895 2993 6081 and Passcode: 857836

² Since most communication with staff, homeowners association, neighbors, and the contractor has been with William Delaney, Robin Delaney's spouse, staff's reference to "applicant" includes Mr. Delaney.

I. APPLICABLE CRITERIA

Deschutes County Code (DCC)

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

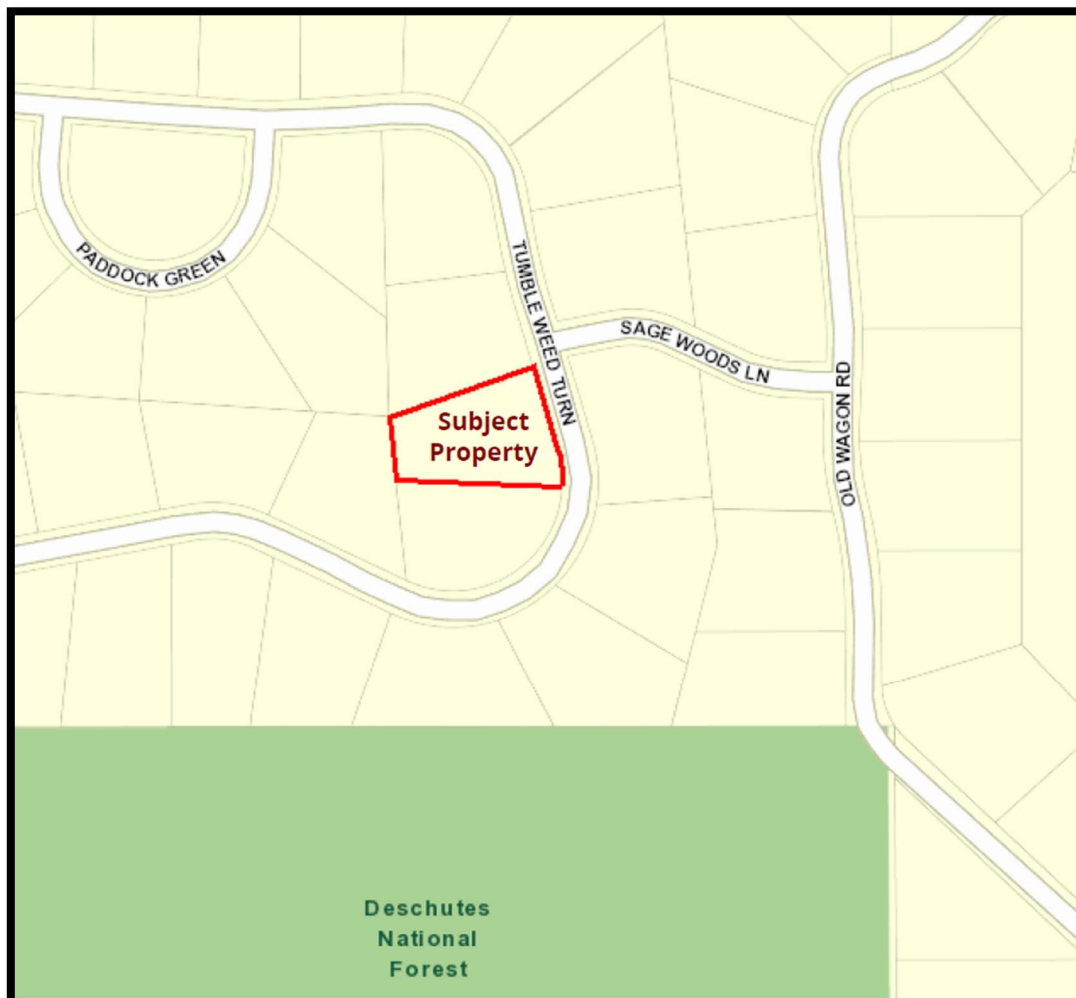
Chapter 18.132, Variances

Title 22, Deschutes County Development Procedures Ordinance

II. BASIC FINDINGS

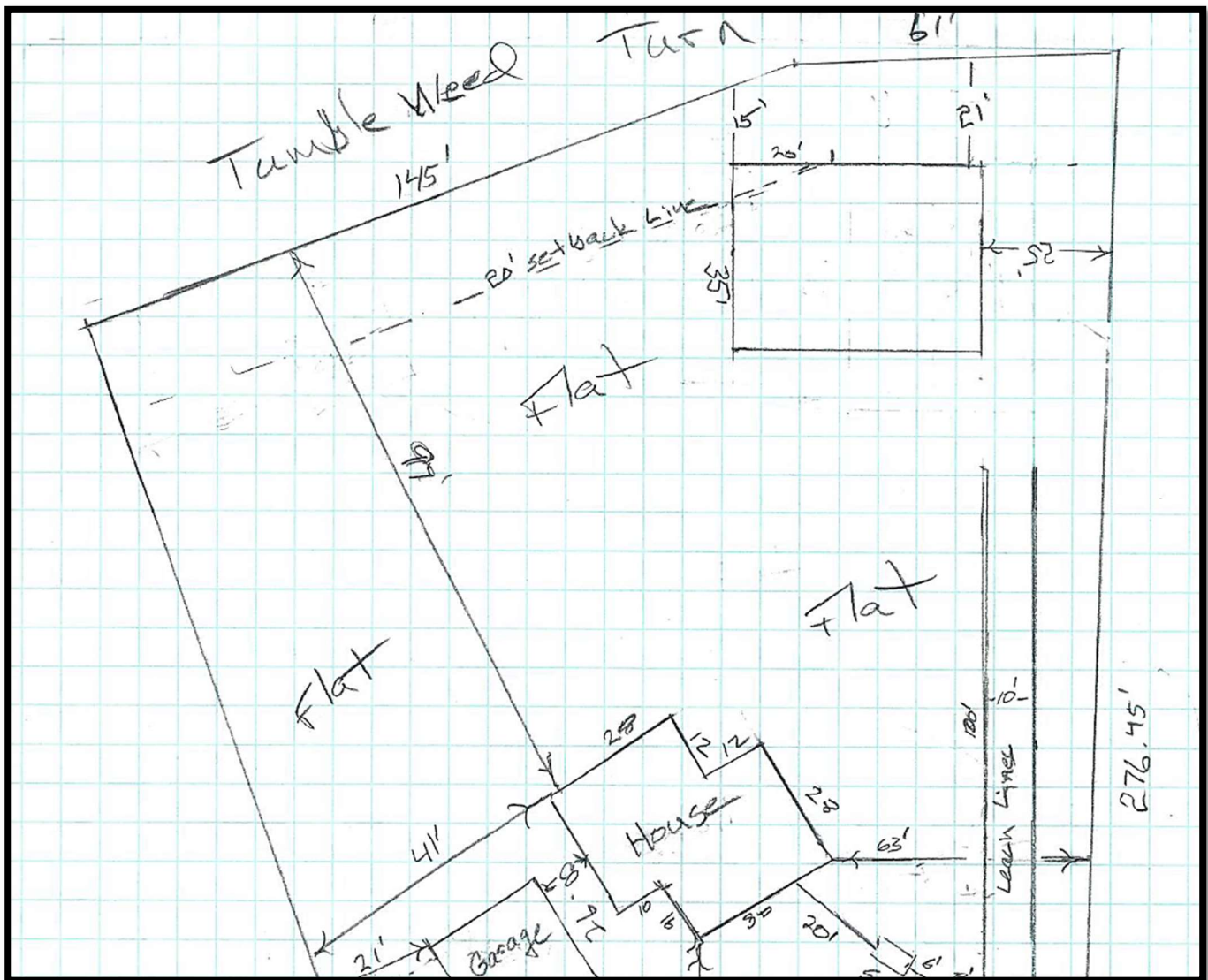
LOT OF RECORD: The subject property is a legal lot of record pursuant to being Lot 43 of Squaw Back Woods Addition to Indian Ford Ranch Homes. Refer to vicinity map below in Figure 1.

Figure 1 – Vicinity Map



SITE DESCRIPTION: The subject property is approximately 0.98 acres and irregularly shaped. Tumble Weed Turn is adjacent to the eastern property boundary. The site is vegetated with native and introduced vegetation. The central region of the property is developed with a single-family dwelling, detached garage, and two sheds. The applicant is requesting an Area Variance to the front yard setback requirement for an accessory pole building that currently exists on the property through the issuance of building permit 247-20-006829-STR. The structure is illustrated as having a 15-foot front yard setback on the attached site plan and partially shown in Figure 2 below.

Figure 2 – Site Plan (partial)



PUBLIC AGENCY COMMENTS: The Planning Division mailed notice on March 2, 2021, to the following public agency and received the following comments:

Deschutes County Building Safety Division: Randy Scheid, Building Safety Director, submitted the following comments on March 2, 2021.

NOTICE: The Deschutes County Building Safety Divisions code mandates that Access, Egress, Setbacks, Fire & Life Safety, Fire Fighting Water Supplies, etc. must be specifically addressed during the appropriate plan review process with regard to any proposed structures and occupancies.

Accordingly, all Building Code required items will be addressed, when a specific structure, occupancy, and type of construction is proposed and submitted for plan review.

STAFF COMMENT: The applicant's representative, David Stowe, obtained building permit 247-20-006829-STR in October 2020 for the structure. The submitted site plan illustrated a front yard setback of 20 feet and different orientation than what was being built on the property. Based on conversations with neighbors in the subdivision, Planning staff notified Mr. Scheid that there might be a discrepancy with the proposed building footprint. In response, Mr. Scheid called the Mr. Stowe on December 22, 2020, leaving a message that there is a concern about the accuracy of the front yard setback illustrated on the original submitted plans. Mr. Scheid requested the contractor stop construction until the front yard setback is reevaluated. On January 6, 2021, Mr. Stowe submitted a revised site plan illustrating the correct orientation of the building and a setback of 21 feet. Some level of construction continued after this point. The structure is physically on the property and several, if not most, of the required inspections have occurred. The Building Safety Division has not completed its review because it is awaiting outcome of the subject area variance.

For reference, acknowledgement of the following statement is required with the submittal of a building permit.

Zoning Setback

The inspector's review of zoning setbacks is based on information provided by the applicant. Only a State of Oregon Licensed land surveyor can certify the correct location of this building on this lot. Deschutes County Community Development Department strongly recommends that the applicant retain a licensed land surveyor to verify the zoning setbacks applicable to this lot. Accuracy of building setbacks is the sole responsibility of the applicant and the applicant accepts all risks associated with any inaccurate information contained in the County's setback review because the County is relying on information provided by the applicant.

The following agencies did not respond to the notice: Cascade Natural Gas Company, CenturyLink, Deschutes County Assessor, Deschutes County Environmental Soils Division, Deschutes County Road Department, Deschutes County Property Address Coordinator, Deschutes County Senior Transportation Planner, Indian Meadow Water Company, Oregon Department of Aviation, Oregon Deputy State Fire Marshal, Oregon Watermaster – District 11, Pacific Power and Light, and Sisters-Camp Sherman Rural Fire Protection District.

PUBLIC COMMENTS: The Planning Division mailed notice of the land use permits to all property owners within 250 feet of the subject property on March 2, 2021. The applicant also complied with the posted notice requirements of Section 22.23.030(B) of Title 22. The applicant submitted a Land Use Action Sign Affidavit indicating the applicant posted notice of the land use action on March 3, 2021.

Comments expressing concern regarding the project were submitted by twelve property owners within the subdivision or surrounding area. The concerns³ expressed by the neighbors are addressed in appropriate sections of the decision and are summarized below.

- Rural character of the area
- Visual impacts (e.g. lighting, size, and location)
- Property value impacts
- Safety issues (e.g. safety of road users)
- Blatant disregard to the rules and regulations
- Building permit violation (providing inaccurate plans)
- Required setback violation
- Cost comparison to dismantle and rebuild the structure is in question
- Repeated suggestions to applicant/owner to obtain a professional survey
- Screening/landscaping

REVIEW PERIOD: The subject application was submitted on February 26, 2021. An incomplete application letter was sent 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 this information, the 150th day on which the County must take final action on this application is November 13, 2021.

III. FINDINGS & CONCLUSIONS

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***

³ Staff finds that some of the issues presented by the public are not related to the proposed structure or do not present an interpretation issue with DCC; rather it involves other issues. In particular, several comments indicate violation of the homeowners association's regulations and restrictions).

- 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 bringing 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: Deschutes County has an active code compliance⁴ case, 247-21-000262-CE, related to the proposed structure. This case is currently being held in abeyance pending the outcome of the proposed area variance, which is intended to resolve the front yard setback issue. 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). Staff believes 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.

⁴ Formerly referred to as "code enforcement."

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.

Title 18, Deschutes County Zoning Ordinance

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: 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 subject property is adjacent to Tumble Weed Turn along its eastern boundary. The applicable setback is 20 feet. However, the subject structure is located approximately 15 feet from Tumble Weed Turn. Otherwise, the proposed structure complies with setbacks in sections (B)

through (C). Planning staff confirmed compliance with the solar setback requirements through the review of building permit 247-20-006829-STR. In addition, any greater setbacks required by applicable building or structural codes adopted by the State of Oregon and/or the County under DCC 15.04 were reviewed for compliance through building permit 247-20-006829-STR.

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: The property is not adjacent to a stream or lake. Therefore, this criterion will be met.

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.***
- 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: 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.

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 18.80, Airport Safety Combining Zone (AS)

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 proposed development is located beneath the conical surface for the Sisters Eagle Air Airport. Therefore, the provisions of this chapter apply.

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: The proposed structure(s) will have a maximum elevation of 3,169 feet above sea level. Per DCC 18.80.022, 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. Therefore, staff finds the proposed development will not penetrate the imaginary surfaces. This criterion will be met.

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: The subject property is not within the noise impact boundary associated with the Airport. This criterion 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: The proposed use is not an industrial, commercial, or recreational use. 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. To ensure compliance, staff recommends this be made a condition of any approval be added. This criterion will be met as conditioned.

- 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: To ensure compliance, staff recommends a condition of any approval be added.

- 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: The proposed use is not an industrial, mining or similar use, or expansion of an existing industrial, mining or similar use. This criterion 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 proposed use will not cause or create electrical interference. This criterion will be met.

- 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: The proposed structure will not be located within/beneath one of the identified surfaces. This criterion will be met.

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: The proposed use is permitted outright in the underlying zone. Above, staff addresses the applicable criteria under DCC 18.80.044. Therefore, the proposed use is allowed outright in the AS Combining Zone.

Chapter 18.116, Supplementary Provisions

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 applicant is requesting a variance to the front yard setback. Staff interprets this section to apply to the standard zone yard requirements or an approved variation of such yard requirements. If approved, staff recommends the Hearings Officer make this criterion a condition of approval.

Chapter 18.120, Exceptions

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: The exceptions to yard requirements are provided for reference. Staff notes these exceptions are specific to “yards” and do not apply to “setbacks” such as stream or rimrock setbacks. The applicant is requesting a variance to the front yard setback. As noted in the subsequent finding, staff interprets this section to apply to the standard zone yard requirements or an approved variation of such yard requirements.

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.

FINDING: Section 18.04.030 defines “variance” and “area variance” as:

"Variance" means an authorization for the construction or maintenance of a building or structure, or for the establishment or maintenance of a use of land, which is prohibited by a zoning ordinance.

A. *"Area variance" means 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 an area variance to the front yard setback requirement for an accessory building that currently exists on the property. The structure is illustrated in the application materials as having a 15-foot front yard setback. Since the proposal encompasses a variance from otherwise applicable setback requirements, staff finds the applicant’s proposal constitutes an “area variance” subject to all of following approval criteria.

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

FINDING: The record indicates that the 0.98-acre property has relatively level topography and fronts on a curved portion of Tumble Weed Turn road. The central region of the property is developed with a single-family dwelling, detached garage, and two sheds. The literal application of the ordinance in this instance is the requirement for a minimum 20-foot front yard setback for structures. Based on the size of the subject and location of existing structures, staff believes there is sufficient area on the property to locate the pole building and satisfy the applicable setback.

As noted previously, the applicant’s representative, David Stowe, obtained building permit 247-20-006829-STR in October 2020 for the structure. The submitted site plan illustrated a front yard setback of 20 feet and different orientation than what was being built on the property. As required with the submittal of the building permit, Mr. Stowe signed the zoning setback acknowledgement

(noted above). On January 6, 2021, the Mr. Stowe submitted a revised site plan illustrating the correct orientation of the building and a front yard setback of 21 feet. However, in this location, the minimum setback is not met since the structure is closer to 15 feet⁵, not 20 (or 21) feet from the front property boundary. Since the structure is for the most part completed, the literal application of the ordinance would require the removal, remodel, or relocation of the structure. For the structure to remain, it necessitates a variance.

This variance criterion requires weighing the applicant's practical difficulties and private expense against the "public benefit" that would result from requiring the applicant to remove or remodel the pole building. Neither the Comprehensive Plan nor the Development Code has any express language as to intent of setbacks in the RR-10 Zone. It is inferred that the setback contributes to the rural residential aesthetic⁶ described as the purpose of the RR-10 zone in both the Comprehensive Plan and Development Code and contributes to reduce conflicts between on-site residential uses and use of the road right-of-way. The setback also allows for potential expansion of the right of way, should traffic demand be greater in the future. Staff notes that no incompatibility with the adjacent right-of-way was identified in discussions with the County Road Department.

The applicant's burden of proof states the proposal satisfies this variance criterion as follows:

The literal application of the requirements of the Deschutes County Code would require that the subject building be relocated. This would result in substantial expense to the Applicant and effectively require the teardown and reconstruction of the building. The cost to do so would be between \$300,000 and \$400,000. There would be little or no public benefit as it would merely relocated the building a few feet. As discussed in the criteria above, the subject structure is located outside of the side yard and rear yard setbacks, as far south on the subject property as practical, and only the corner of the subject structure is within the front yard setback, therefore it will not create any problems for adjacent property owners or the County Road Department.

Staff has no doubt the removal and reconstruction of the pole building could result in a practical difficulty resulting in considerable private expense for the applicant. Several neighbors, however, question the estimate cost as "overstated" for the removal and rebuilding of the structure. In addition, comments regarding the overall size and location of the building together with significant pine tree removal contribute to an intrusive appearance and less aesthetically pleasing for the neighborhood. These impacts to the rural character of the area together with road safety concerns and property value impacts presents the question of whether the public benefit outweighs applicant's practical difficulties and private expense. The applicant has submitted additional comments into the record that addresses some of the neighbors' comments and concerns. Such comments submitted as of July 9, 2021 are incorporated herein by reference.

⁵ The measurement of 15 feet is not known to be accurate since neither Mr. Stowe nor the applicant/owner has retained a licensed land surveyor to verify this measurement.

⁶ Staff believes this may include assurance of adequate space, light, and air between buildings.

Staff Comment: Staff recommends the Hearings Officer determine if the applicant has adequately demonstrated compliance with this variance approval criterion and that the literal application of the ordinance creates practical difficulties resulting in greater private expense than public benefit.

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

FINDING: In County file V-01-11, *Edwards*, the Hearings Officer found:

The Hearings Officer finds the determination of whether the applicant has demonstrated compliance with this criterion turns on how one defines the condition creating the difficulty. In a previous decision (McBride, V-01-10), I found that in the context of this criterion, which refers to the "site" and the "surrounding area," the "condition creating the difficulty" necessarily applies to the physical characteristics of the subject property. Therefore, I find the condition creating the difficulty for the applicant is the lack of sufficient space on the subject property to allow placement of another building that meets the minimum required setbacks.

The subject property is slightly larger than three-quarters of an acre in size. It abuts the Deschutes River on the north and is approximately 165 feet wide and approximately 200 feet deep. The Haner Park Subdivision was platted in the 1950's, long before the county adopted land use regulations. Twenty years later, the county adopted the F-2 Zone and its 100-foot side yard setbacks applicable to lots like the subject property that abut other forest-zoned lots. The result was that no additional buildings could be constructed on the applicant's 165-foot-wide lot and still meet the 100-foot side yard setbacks. Clearly, then, the condition creating the difficulty arises directly from the physical characteristics of the subject property.

The remaining question is whether this condition is unique to the subject property or is "general throughout the surrounding area." In his burden of proof, the applicant asserts "[t]his type of pole building is general in this area." This argument misses the mark. The issue is whether the size constraint on the subject property is unique. The Hearings Officer finds it is not. The record includes a copy of a county tax map showing the subject property and surrounding lots. This map shows a number of other lots with similar sizes and dimensions to those of the subject property.

For the foregoing reasons, the Hearings Officer finds the applicant has failed to demonstrate his proposal satisfies this variance approval criterion.

Staff Comment: Staff believes the Hearings Officer will need to identify clearly, "the condition creating the difficulty", and whether that condition is "unique to the applicant's site".

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.

Attachment: 2021-07-12 183-V Staff Report (4097 : 247-21-000183-V)

FINDING: For reference, the applicant obtained ownership of the subject property in 2019 through the conveyance of Statutory Warranty Deed recorded as Document 2019-31744 with the County Book of Records. At the time of conveyance, the zoning designation of the subject property was RR-10. This zoning designation has been in place since at least the adoption of PL-15 on November 1, 1979, which was carried through with the adoption of current zoning ordinance Title 18 on November 29, 1995.

As noted previously, the applicant retained a licensed contractor, David Stowe, to file and obtain all appropriate building permits (Permit Number: 247-20-006829-STR) in October 2020. The applicant states,

The Applicant's contractor measured the required front yard setback, in error, from the front property line, but failed to take into consideration the correct location of the bend in Tumble Weed Turn that puts the corner of the subject structure in the front yard setback. This condition was not created by the Applicant

In County file V-07-2, *Healy*, the Hearings Officer found:

However, this variance approval criterion makes clear that the failure of a property owner to exercise due diligence in determining applicable restrictions constitutes a self-created difficulty.

Through review of submitted comments by neighbors and the applicant⁷, together with the building permit history, staff is unable to determine if the applicant exercised due diligence in this situation; in addition, whether they should have known of the front yard setback restriction. Staff notes the following actions that have occurred in this process.

- **Prior to October 2020** – There was some level of review of the plans by the homeowner's association (and their respective design review committee), as acknowledged by the applicant and neighbors.
- **October 2020** – Building permit submittal included a site plan that illustrated a front yard setback of 20 feet and different orientation than what was being built on the property.
- **October 2020** – An owner authorization was submitted with the building permit, which allowed the Mr. Stowe to submit the building permit on the owner's behalf.
- **October 2020** – Building permit submittal included a zoning setback acknowledgement signed by Mr. Stowe, which places the burden and sole responsibility on the permit applicant including acceptance of all risks that may be associated with inaccurate information.
- **December 22, 2020** – Building Safety Director requested that construction cease until the correct front yard setback was determined.

⁷ Staff understands that most communication (homeowners association, neighbors, and contractor) has been with William Delaney, Robin Delaney's spouse.

- **December 2020 – January 2021** – The applicant acknowledged⁸ that between the time in which the Building Safety Director contacted Mr. Stowe in December and the revised site plan submitted on January 6, 2021, Mr. Stowe re-measured the front yard setback; determining the structure may be actually be 19 feet to the property boundary. Mr. Stowe shared this information with the applicant, including a discussion about the possibility of needing a Minor Variance (DCC 18.132.025) from the County Planning Division.
- **January 6, 2021** – Mr. Stowe submits a revised site plan illustrating the correct orientation of the building and a front yard setback of 21 feet.
- **October 2020 – January 2021** (approximate) - Public comments also suggest that there have been various interactions with the applicant, not Mr. Stowe, regarding the potential inaccurate front yard setback. Communication occurred early in the develop phase and after the revised site plan was submitted to the County's permit 247-20-006829-STR. Some neighbors even recommending that the applicant obtain a professional survey so the front property line, and setback, could be correctly determined. The applicant indicates that he left it up the Mr. Stowe to determine if a professional was necessary in this situation. Mr. Stowe nor the applicant/owner retained a licensed land surveyor to verify the property line or the accuracy of the front yard setback of 15 feet⁹.

Staff Comment: Given the particular circumstances in this case, Staff recommends the Hearings Officer determine if the applicant exercised due diligence in this situation; in addition, whether they should have known of the front yard setback restriction. The Hearings Officer will need to determine if this is not a case of self-created difficulty because the applicant relied in good faith on their contractor and was unaware of either the regulations and/or the location of the property line.

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

FINDING: As noted in a foregoing finding, neither the Comprehensive Plan nor the Development Code has any express language as to intent of setbacks in the RR-10 Zone. It is inferred that the setback contributes to the rural residential aesthetic described as the purpose of the RR-10 zone in both the Comprehensive Plan and Development Code and contributes to reduce conflicts between on-site residential uses and use of the road right-of-way.

The subject building is a pole building, which is recognized as a rural residential improvement. Additionally, the property is approximately one-acre in size and provides ample area for residential improvements like the proposed building. However, neighbor concerns indicate the proposed development detracts from the rural characteristic, which is the intent of the setback provisions.

⁸ See May 26, 2021 comments by the applicant.

⁹ The applicant has provided a professional landscape plan that illustrates the structure located within the front yard setback. However, staff believes this plan was not conducted by a licensed land surveyor.

The applicant has provides a detailed landscaping plan, some of which has already been installed on the property. Staff believes this provides a visual buffer of the structure, allowing it to blend it with the rural character of the area. Staff notes that no incompatibility with the adjacent right-of-way was identified in discussions with the County Road Department.

Staff Comment: Based on neighbor concerns, Staff recommends the Hearings Officer determine whether the variance conforms to the Comprehensive Plan and the intent of the ordinance being varied.

IV. **CONCLUSION AND RECOMMENDATION:**

Based upon the preceding analysis, staff believes that additional information is necessary to determine if the applicant can meet all of the required approval criteria. Staff recommends the Hearings Officer review the issues raised in the Staff Report specifically:

- Whether the applicant has adequately demonstrated that the literal application of the ordinance creates practical difficulties resulting in greater private expense than public benefit as specified in DCC 18.132.020(A)(1).
- Clearly identify the “the condition creating the difficulty” and whether that condition is “unique to the applicant's site” as discussed in DCC 18.132.020(A)(2).
- Whether the applicant exercised due diligence in this situation and whether they should have known of the front yard setback restriction as discussed in DCC 18.132.020(A)(3). The Hearings Officer will need to determine if this is not a case of self-created difficulty because the applicant relied in good faith on their contractor and was unaware of either the regulations and/or the location of the property line.
- Whether the proposed variance conforms to the Comprehensive Plan and the intent of the ordinance being varied as discussed in DCC Section 18.132.020(A)(4).