FLATHEAD COUNTY PLANNING AND ZONING OFFICE
ZONING VARIANCE REPORT (#FZV-10-01)
JUNE 22, 2010

A report to the Flathead County Board of Adjustment regarding a request by Paul and Virginia DeToni for a variance to Section 4.1 (F)(9) of the Canyon Area Land Use Regulatory System regarding building setbacks on their property located at 12135 Highway 2 West in the Middle Canyon zoning district.

The Flathead County Board of Adjustment will hold a public hearing on the variance request on July 6, 2010 beginning at 6:00 P.M. in the 2nd floor conference room of the Earl Bennett Building, 1035 First Avenue West, Kalispell. Documents pertaining to this application are available for public inspection at the Flathead County Planning and Zoning Office, also located on the second floor of the Earl Bennett Building.

I. APPLICATION REVIEW UPDATES

A. Land Use Advisory Committee/Council

The proposed land use is located within the advisory jurisdiction of the Middle Canyon Land Use Advisory Committee. On June 29, 2010 at 7:00 P.M. in the Glacier Park Headquarters Community Room the Middle Canyon Land Use Advisory Committee will hold a public meeting to review the variance request and make a recommendation to the Flathead County Board of Adjustment. This space is reserved for a summary of the Committee's discussion and recommendation.

B. Board of Adjustment

The Flathead County Board of Adjustment will hold a public hearing to review the variance request on July 6, 2010 beginning at 6:00 P.M. in the 2nd floor conference room of the Earl Bennett Building. This space is reserved for a summary of the Flathead County Board of Adjustment's discussion and decision at that hearing.

II. GENERAL INFORMATION

A. Application Personnel

i. Applicant(s)

Paul & Virginia DeToni
P.O. Box 1108
Wickenburg, AZ 85358
(406) 253-6925
(928) 231-0165

ii. Landowner(s)

Mule Shoe Outfitters, LLC
P.O. Box 322
West Glacier, MT 59936
rideaz@bwmail.us

iii. Technical Assistance

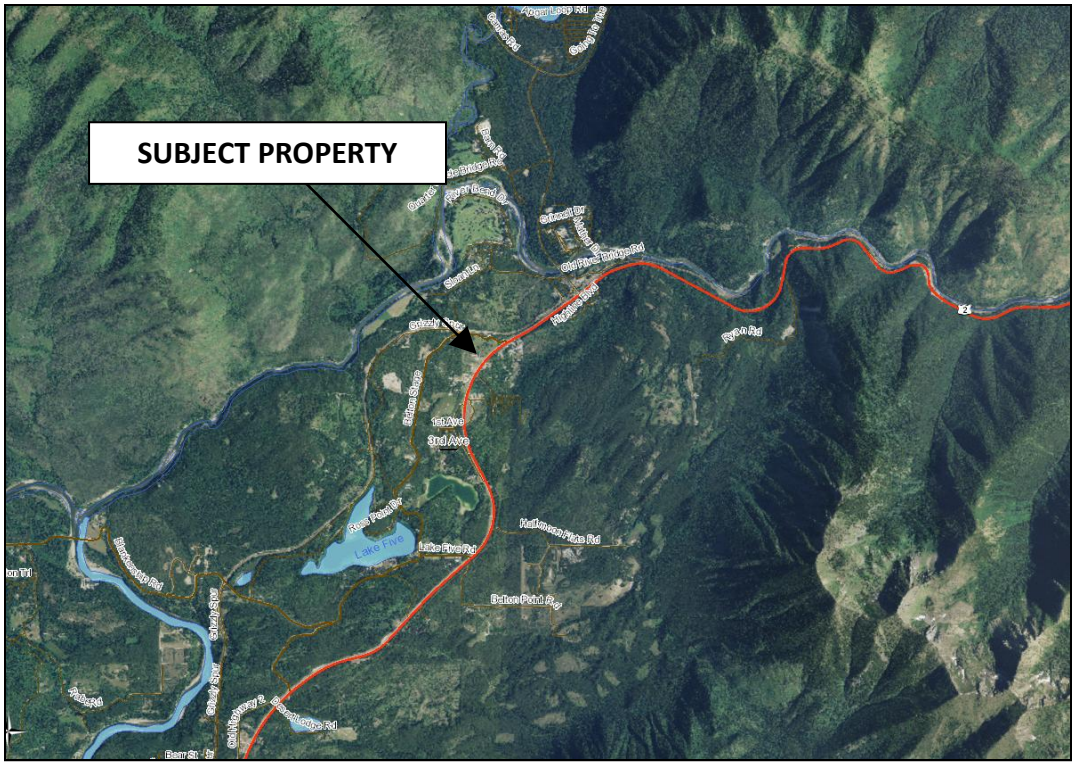
Maxwell G. Battle, Jr.
Battle & Edenfield, P.L.L.C.
P.O. Box 3220
Kalispell, MT 59903
(406) 752-4107

B. Property Location (for which a variance is being requested)

The subject property is located along the west side of US Highway 2 (see Figure 1 below), and can be legally described as Tract 4 in Lot 4 located in Section 2, Township 31 North, Range 19 West, P.M.M., Flathead County, Montana. The address of the subject property is 12135 Highway 2 East, and the tract of land is approximately 6.7 acres in size.

Figure 1: Aerial view of subject property (highlighted in yellow).

Figure 2: General site location.



C. Existing Land Use(s) and Zoning

The subject property is located within the Middle Canyon Zoning District and is zoned "Middle Canyon" pursuant to the Canyon Area Land Use Regulatory System. The applicants' claim the existing structure is currently used for residential purposes, but was at one time permitted for a booking and reservation office for Mule Shoe Outfitters, LLC (pursuant to permit #FCAP-03-04).

D. Adjacent Land Use(s) and Zoning

The surrounding area is similarly zoned "Middle Canyon", and the majority of properties in the immediate area with highway frontage are commercial in nature. To the south of the subject property there is a raft guiding business with rental cabins, and further south across U.S. Highway 2 there is a trading post, souvenir shop and restaurant. A helicopter touring business is located to the north, and there is a campground to the immediate east across the highway.

E. Summary of Request

The applicant has requested a variance to Section 4.1(F)(9) of the Canyon Area Land Use Regulatory System requiring a minimum building setback of 150 ft. along the highway if the property is located outside of the "Designated Community" or "Designated Service" center. The existing structure, built in 2002, encroaches into the 150 ft. setback required. The site plan shows one corner of the building located 50 from the property boundary and U.S. Highway 2 right-of way, for a total encroachment of 100 ft. The highway right-of- way is approximately 250 feet wide

in front of the subject property, with approximately 125 feet extending on either side of the highway centerline. The site plan shows the building at a slight offset to the highway right-of-way; aerial photography confirms this offset, with the building situated at what appears to be a 45-degree angle to the right-of-way and the eastern corner closest to the property line. According to rough measurements taken using aerial photography and the County's GIS property shapefiles, the building corner appears to be less than 30 ft. from the highway right-of-way (see Figure 3 below). Based on the applicant's statement and staff's estimate, and without evidence from a licensed surveyor to establish the exact setback measurement, the *entire* structure appears to sit within the 150 ft. setback, encroaching a *minimum* of 100 ft. into the required setback.

Figure 3: Approximate building setback (shown by red line).

F. Compliance with Public Notice Requirements

Notification was mailed to property owners within 150 feet of the subject property on June 9, 2010, pursuant to Section 2.05.030 (2) of the Zoning Regulations. Legal notice of the public hearing on this application will be published in the June 20, 2010 edition of the Daily Interlake.

G. Agency Referrals

Referrals were sent to the following agencies on May 25, 2010:

- Agency: Montana Department of Transportation
  - Reason: The location of the existing structure has the potential to impact the Department of Transportation's right-of-way and

infrastructure in the future.

III. COMMENTS RECEIVED

A. Public Comments

No written public comments have been received to date regarding the variance request. It is therefore anticipated any individual wishing to provide public comment on the application will do so during the public hearing scheduled for July 6, 2010.

B. Agency Comments

The following is a summarized list of agency comment received as of the date of the completion of this staff report:

- Kyle DeMars, Montana Department of Transportation (by telephone)
  - Wanted to make sure the existing structure was not located within the Montana Department of Transportation right-of-way;
  - As long as the building was outside the right-of-way, he had no concerns regarding the variance request.

IV. CRITERIA REQUIRED FOR CONSIDERATION

Per Section 2.05.030 of the Flathead County Zoning Regulations, what follows are review criteria for consideration of a variance and suggested findings of fact based on review of each criterion. Specifically, per Section 2.05.030 of the Flathead County Zoning Regulations, "No variance shall be granted unless the Board (of Adjustment) finds that all of the following conditions are met or found to be not pertinent to the particular case":

A. Strict compliance with the provisions of these regulations will:

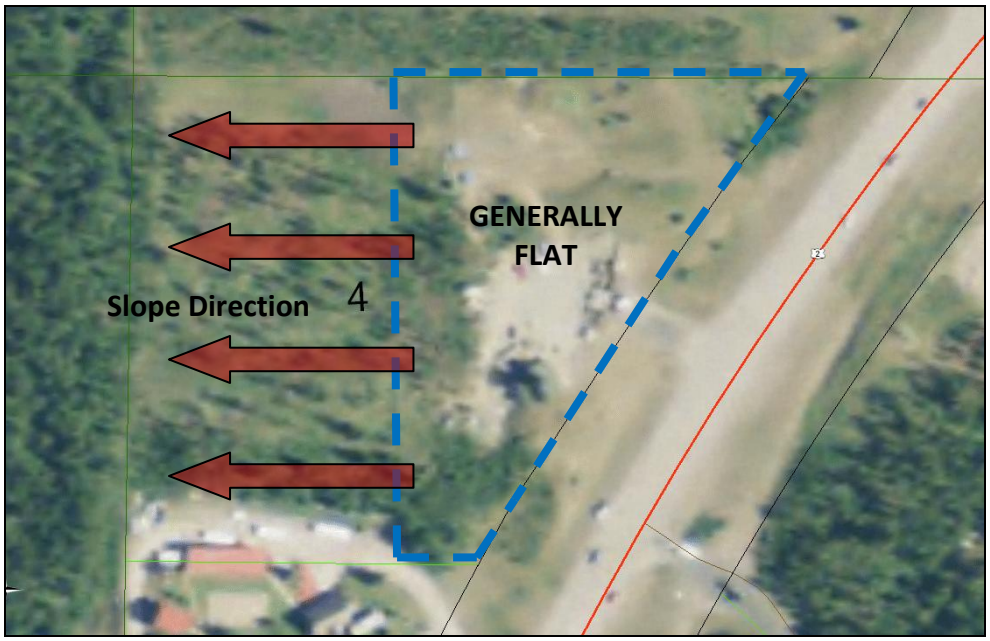
i. Limit the reasonable use of property;

The applicant states that the location of the building was chosen based on the size and shape of the parcel and it's adjacency to the highway, so as to provide safe access, not impose on the surroundings or obstruct the view. The subject property is just under 7 acres in size and has over 600 feet of frontage along U.S. Highway 2. The west half of the property slopes back away from the highway (see Figure 4 below), and structures situated on this portion of the property would be partially blocked by the topography and foliage. However, the east portion of the property fronting U.S. Highway 2 is relatively flat and provides adequate space in which a structure could be located without encroaching into the 150 ft. setback. The use of the property for residential or commercial purposes as allowed by CALURS would not be limited by requiring the building to meet the applicable setbacks, as signage, parking and circulation would still be allowed within the required setbacks.

Finding #1 - Strict compliance with the regulations would not limit the reasonable use of the property because the property is large enough to accommodate a building that complies with the required setbacks, and

although the back half of the property slopes west there is enough level ground on the eastern portion of the property fronting the highway to locate a structure without encroaching into the 150 ft. setback.

Figure 4: Generalized diagram of topography on subject property.



ii. Deprive the applicant of rights enjoyed by other properties similarly situated in the same district.

Properties located within the designated community or service centers require a 40 ft. setback from the highway right-of-way; properties outside of these locations require an increased setback of 150 ft. from the highway right-of-way. Although all properties are located within the Middle Canyon zoning 'district', the regulations make a clear distinction between properties situated within the community or service centers and properties outside of these areas. Buildings constructed today, and since 1994 on property similarly situated along U.S. Highway 2 and outside of the community or service center would be required to meet the same 150 ft. setback from the highway right-of-way that is being required of the subject property. Buildings or structures that predate the adoption of the Canyon Area Land Use Regulatory System on December 29, 1994 are recognized as grandfathered non-conforming structures and are not required to meet this 150 ft. setback; as previously discussed, the structure located on the subject property was built in 2002.

Finding #2 - Strict compliance with the regulations would not deprive the applicant of rights enjoyed by other properties similarly situated in the same district because the building located on the subject property was constructed after the adoption of the Middle Canyon zoning district, and because all buildings constructed on property within the Middle Canyon

zoning district, outside of the designated community or service centers and having highway frontage would be required to meet the same 150 ft. setback that applies to the subject property, and have been since 1994.

B. The hardship is the result of lot size, shape, topography, or other circumstances over which the applicant has no control.

As previously discussed, the subject parcel is nearly 7 acres in size, approximately half of which is relatively flat while the other half slopes west toward the back of the property. The flat portion of the property is located on the east side, running adjacent to U.S. Highway 2. The lot itself is shaped like a trapezoid, mostly rectangular with the angled lot line running north to south along the highway. It appears the applicant had complete control over the placement of the structure in 2002 and was not limited by lot size, shape or extreme topography when choosing the location of the building.

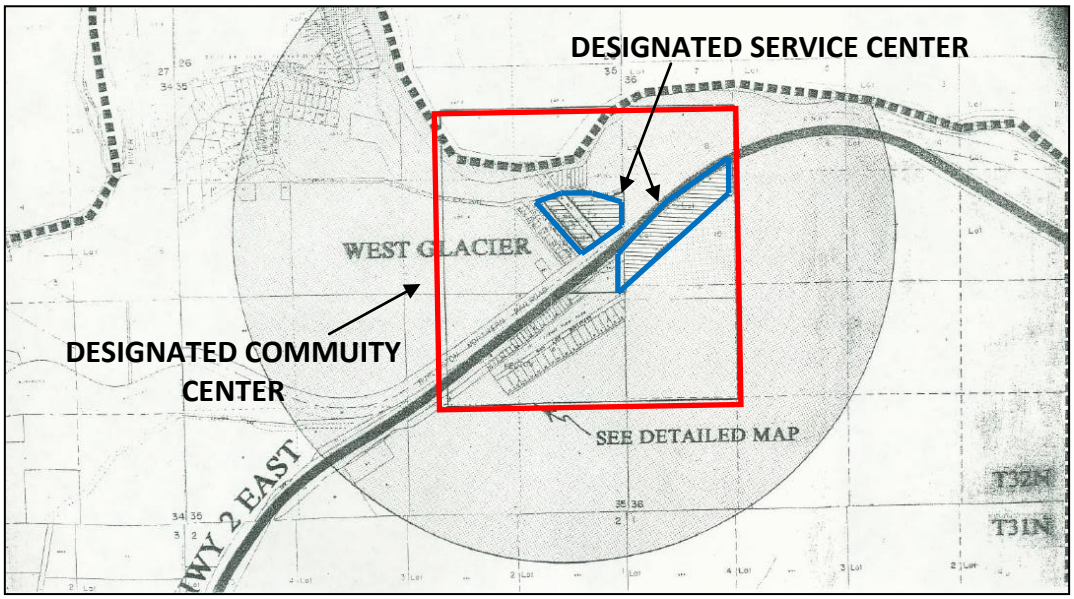
Finding #3 – The hardship is not the result of lot size, shape or topography because the subject property is large enough to accommodate a building that complies with the required setbacks, is not oddly shaped, has no extreme topography that would preclude or dictate the placement of the structure, and because the applicant had control over the structure's location when it was built in 2002.

C. The hardship is peculiar to the property.

All property along U.S. Highway 2 located outside of the designated community or service center is subject to the same 150 ft. setback requirement that applies to the subject property. After evaluating the number of properties located within the designated service and community center, based on the definitions provided in Section(s) 7.8 and 7.9 of CALURS and shown in the following diagram, approximately 50 parcels have highway frontage and would be permitted a 40 ft. setback as opposed to the 150 ft. setback required throughout the rest of the district. The majority of property with frontage along U.S. Highway 2 and located within the Middle Canyon zoning district is located outside of these designated areas and would be subject to the same setback requirement of 150 ft. from the highway right-of-way.

Finding #4 – The hardship is not peculiar to the subject property because the majority of property located within the Middle Canyon zoning district and having frontage along a U.S. highway are situated outside of the designated service or community centers and would be subject to the same 150 ft. setback requirement as the subject property.

Figure 5: Designated community center (in red) and service center (in blue).



D. The hardship was not created by the applicant.

The hardship was created by the applicant. The building was constructed in 2002 in compliance with state requirements for a commercial structure, as evidenced by the permit furnished by the applicant (Permit #02-0661). At that time the applicant believed he had met all necessary requirements and the structure proposed was in compliance with the local zoning. However, the permit expressly states that "(the) granting of this provisional permit does not presume to give authority to violate or cancel the provisions of any other state or local law regulating construction or the performance of construction." Furthermore, the permit requires the applicant to "check local zoning requirements." These statements indicate it was the owner and applicant's responsibility at the time of construction to ensure the building was constructed in compliance with any zoning in place. The Canyon Area Land Use Regulatory System was adopted by Resolution #1049A on December 29, 1994, and was in effect at the time the building was constructed.

The application states that at the time of construction, the regulations were unclear with regard to setback requirements in different areas of the Middle Canyon zoning district. Section 4.1(F)(9) identifies a minimum front yard setback of 20 ft., which increases to 40 ft. when a property fronts a U.S. highway. This statement is followed by an asterisk (*) which identifies an increased setback of 150 ft. for any property fronting the highway outside of a designated community or service center. Based on surrounding commercial uses, the applicant assumed he was located within a designated community or service center. According to the definitions found under Sections 7.8 and 7.9 of CALURS and the accompanying map identifying community and service center locations in West Glacier (shown in Figure 5 above), the property is definitively located outside of the designated service areas.

Finding #5 - The hardship was created by the applicant because the building was constructed in 2002 outside of the community and service center areas designated by the Canyon Area Land Use Regulatory System, and because although the applicant

received a provisional building permit from the State of Montana, the permit expressly states the recipient should "check local zoning requirements."

E. The hardship is not economic (when a reasonable or viable alternative exists).

Aside from obtaining a variance to the setback requirements of the Middle Canyon district, the alternative to alleviate the setback violation would require the applicant to move the entire building out of the 150 ft. setback. The cost of moving the building would be substantial, as the building footprint is over 600 sq. ft. and sits on a permanent foundation. The application states that moving the building would cost tens of thousands of dollars, and that although this hardship is clearly economic the alternative to move the structure is not reasonable given the excessive cost.

Finding #6 – The hardship is economic but the alternative is not reasonable because it would require the entire building be removed and reconstructed outside of the 150 ft. setback, resulting in a significant financial burden to the applicant.

F. Granting the variance will not adversely affect the neighboring properties or the public.

The building was constructed nearly eight years ago, and the granting of a variance would not change the current property configuration. The building complies with the applicable side and rear yard setback requirements of the Middle Canyon zoning district, and does not obstruct views or detract value from neighboring commercial properties. Comment from the Montana Department of Transportation indicates that as long as the building does not encroach on the actual highway right-of-way owned by the state, the variance request would have no adverse affect on the state's property or public safety along the highway corridor. The subject property is moderately forested on the west and south sides (see Figure 6 below), and there is a slight rise to the north which serves as a visual barrier and sound buffer between the applicant's property and the helicopter touring business on the property to the north. Allowing the building to remain in the existing location would not have an adverse affect on the surrounding properties.

Figure 6: View to the north from the highway corridor, with subject property and building in foreground (photo taken from Google Maps).

Finding #7 – Granting of the variance would not have an adverse affect on neighboring properties or the public because the building has existed in it's current location for eight years, does not obstruct views or detract from the value of adjacent commercial properties, and has no perceived impact on the Montana Department of Transportation highway right-of-way based on agency comment received.

G. The variance requested is the minimum variance which will alleviate the hardship.

The applicant is requesting the variance be granted to allow the building to remain in its current location on the subject property. This would be the minimum variance necessary to alleviate the hardship, given the present circumstances.

Finding #8 - The variance requested is the minimum variance necessary, as it would allow the building to remain in its current location.

H. Granting the variance will not confer a special privilege that is denied other similar properties in the same district.

As previously stated, the subject property is located in an area of the Middle Canyon zoning district that requires a 150 ft. setback from the highway right-of-way for all structures built after the implementation of the zoning district. In the application materials the applicant identifies certain instances in the West Glacier area where a 150 ft. setback has not been required. For instance, properties located within a designated community or service center may build up to 40 ft. from the highway right-of-way, as identified under the setback provisions of CALURS. Properties with structures that pre-date the creation of the zoning district are also not required to meet the 150 ft. setback. These examples highlight exceptions to the zoning in place – in the case of grandfathered, non-conforming structures – as well as designated areas around West Glacier that have been identified by the Canyon Plan as appropriate for certain development and assigned specific bulk and dimensional requirements through the zoning. These properties would not be considered 'similar' to the subject property, as they fall under a different set of circumstances. Instead, similar properties would be those with highway frontage, located within the Middle Canyon zoning district but *outside* of the designated community or service center area, on which development has taken place since 1994. Under these circumstances, similar properties would be required to adhere to the 150 ft. setback requirement of the Middle Canyon district, and properties requesting a variance to this section of the regulations would be reviewed by the same criteria as the applicant's request.

Finding #9 – Granting of the variance would confer a special privilege that is denied other similar properties in the district because properties located outside a designated community or service center with highway frontage that is either undeveloped or has structures that do not predate the creation of the zoning district would be required to meet the 150 ft. setbacks or if a variance were requested, would be reviewed using the same criteria and in the same manner as the property in question.

V. SUMMARY OF FINDINGS

1. Strict compliance with the regulations would not limit the reasonable use of the property because the property is large enough to accommodate a building that complies with the required setbacks, and although the back half of the property slopes west there is enough level ground on the eastern portion of the property fronting the highway to locate a structure without encroaching into the 150 ft. setback.

2. Strict compliance with the regulations would not deprive the applicant of rights enjoyed by other properties similarly situated in the same district because the building located on the subject property was constructed after the adoption of the Middle Canyon zoning district, and because all buildings constructed on property within the Middle Canyon zoning district, outside of the designated community or service centers and having highway frontage would be required to meet the same 150 ft. setback that applies to the subject property, and have been since 1994.

3. The hardship is not the result of lot size, shape or topography because the subject property is large enough to accommodate a building that complies with the required setbacks, is not oddly shaped, has no extreme topography that would preclude or dictate the placement of the structure, and because the applicant had control over the structure's location when it was built in 2002.

4. The hardship is not peculiar to the subject property because the majority of property located within the Middle Canyon zoning district and having frontage along a U.S. highway are situated outside of the designated service or community centers and would be subject to the same 150 ft. setback requirement as the subject property.

5. The hardship was created by the applicant because the building was constructed in 2002 outside of the community and service center areas designated by the Canyon Area Land Use Regulatory System, and because although the applicant received a provisional building permit from the State of Montana, the permit expressly states the recipient should "check local zoning requirements.

6. The hardship is economic but the alternative is not reasonable because it would require the entire building be removed and reconstructed outside of the 150 ft. setback, resulting in a significant financial burden to the applicant.

7. Granting of the variance would not have an adverse affect on neighboring properties or the public because the building has existed in its current location for eight years, does not obstruct views or detract from the value of adjacent commercial properties, and has no perceived impact on the Montana Department of Transportation highway right-of-way based on agency comment received.

8. The variance requested is the minimum variance necessary, as it would allow the building to remain in its current location.

9. Granting of the variance would confer a special privilege that is denied other similar properties in the district because properties located outside a designated community or service center with highway frontage that is either undeveloped or has structures that do not predate the creation of the zoning district would be required to meet the 150 ft. setbacks or if a variance were requested, would be reviewed using the same criteria and in the same manner as the property in question.

VI. RECOMMENDATION

Section 2.05.030 (3) of the Flathead County Zoning Regulations states a variance shall not be granted unless all of the review criteria are met or found to be not pertinent to a particular application. Based on the 9 findings of fact summarized above, the variance request fails to meet five out of the eight review criteria. Therefore staff recommends the Flathead County Board of Adjustment adopt staff report FZV-10-01 as Findings of Fact and deny the request for a variance to Section 4.1(F)(9) of the Canyon Area Land Use Regulatory System (CALURS).