

FLATHEAD COUNTY PLANNING AND ZONING OFFICE
ZONING VARIANCE REPORT (#FZV-13-02)
MCKNIGHT
JULY 17, 2013

A report to the Flathead County Board of Adjustment regarding a request by Fred McKnight, with technical assistance by Richard DeJana for a variance to Section 3.10.040(3)(A) "Bulk and Dimensional Requirements," requiring structures to have a minimum front yard setback of 20 feet from the property line, and Section 2.07.040(3) "Changes Permitted to Non-Conforming Uses" which states structures conforming to use may not be altered or extended if it further deviates from the regulations. The variances requested would apply to the property located at 357 Caroline Point Road, near Lakeside, MT. The property is located within the Caroline Point Zoning District.

The Flathead County Board of Adjustment will hold a public hearing on the variance request on August 6, 2013 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 subject property is located within the Lakeside Neighborhood Plan area. However, recently it has come to staff's attention that under Article 4, Section I(F) of the Lakeside Community Council's bylaws, it states they will '*review applications to FCPZ affecting development or growth in the Lakeside planning area and make recommendations, via FCPZ, to the Flathead County Planning Board and Board of Commissioners.*' Therefore, as this application for a variance goes before the Board of Adjustment, the file is not being reviewed by the Lakeside Community Council prior to the Board of Adjustment meeting on August 6, 2013.

B. Board of Adjustment

The Flathead County Board of Adjustment will hold a public hearing on August 6, 2013. This section will be updated following the meeting.

II. GENERAL INFORMATION

A. Application Personnel

i. Applicant/Landowner

Fred McKnight
P.O. Box 1154
Lakeside, MT 59922
(602) 577-3054

ii. Technical/Professional Assistance

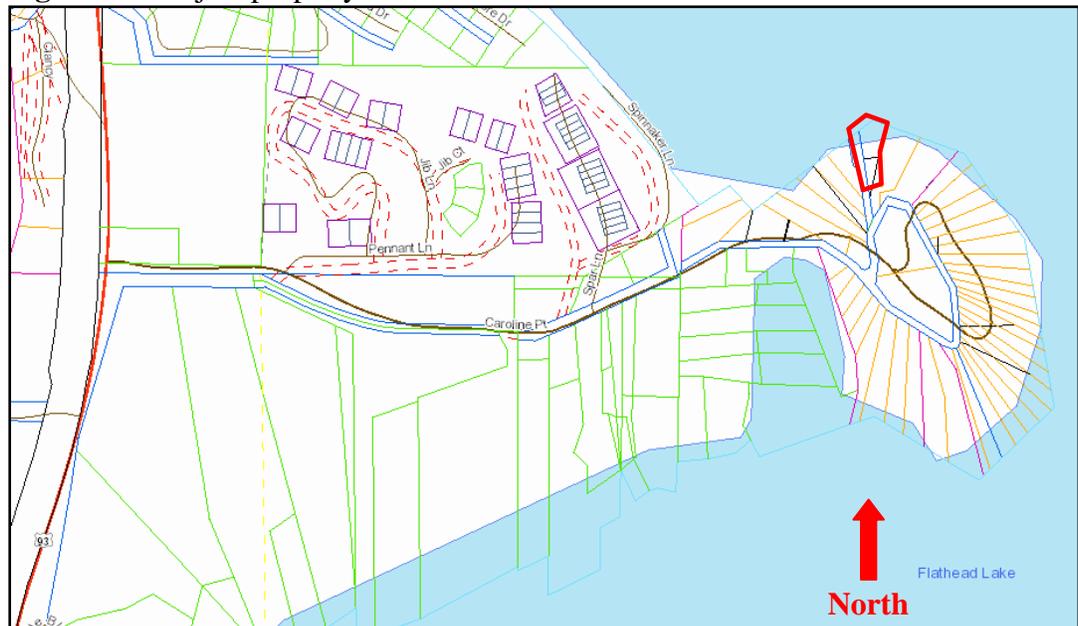
Richard DeJana
Richard DeJana & Associates PLLC

P.O. Box 1757
Kalispell, MT 59903-1757
(406) 752-4120
rdejana@montanasky.net

B. Property Location

The subject property is located approximately 1.5 miles north of Lakeside at 357 Caroline Point Road, approximately 0.5 miles from the intersection of Caroline Point Road and US Highway 93 (see Figure 1 below). The property can be legally described as Lots 6A-TR1, 6A-TR2, 6B-TR1 and 6B-TR2 of Whipp's Point Caroline Villa Sites Subdivision, located in Section 6, Township 26 North, Range 20 West, P.M.M., Flathead County, Montana.

Figure 1: Subject property outlined in red.



C. Existing Land Use(s) and Zoning

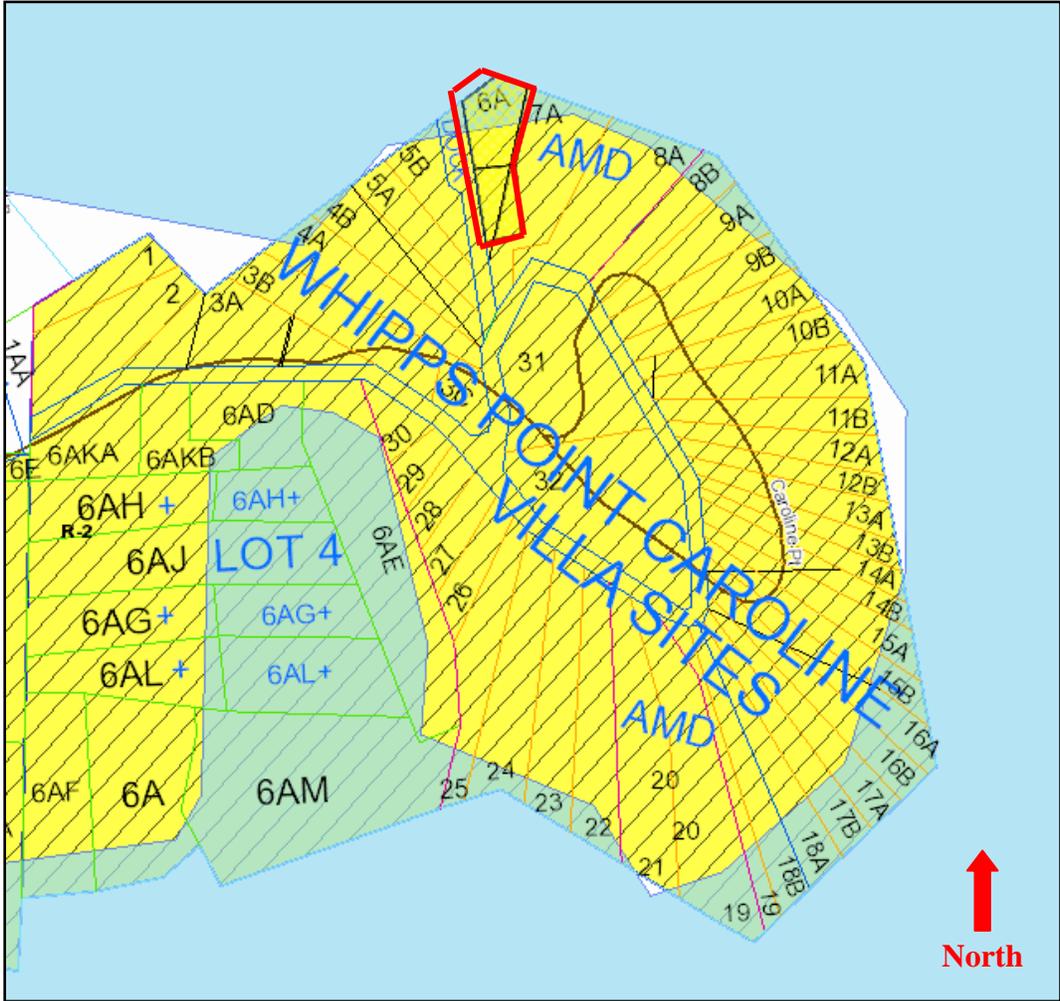
The subject property is located within the Caroline Point Zoning District adopted January 21, 1987 and is currently zoned "R-2 One Family Limited Residential", a district intended "to provide for large-tract residential development. These areas will typically be found in suburban areas, generally served by either sewer or water lines." [Flathead County Zoning Regulations, Section 3.10.010] The subject property is approximately 0.39 acres, and is currently developed with a single-family residential home.

D. Adjacent Land Use(s) and Zoning

As shown by Figure 2 below, parcels immediately surrounding the subject property are also zoned "R-2 One Family Limited Residential." The area surrounding the subject property is primarily residential in nature, with lots ranging between approximately 0.1 and 0.8 acres in size. The majority of the

property owners in the surrounding area own several adjacent parcels in order to construct their residential homes.

Figure 2: Zoning applicable to subject property (red) and surrounding area.



E. Summary of Request

The applicant is requesting a variance to Section 3.10.040(3)(A) of the Flathead County Zoning Regulations (FCZR) regarding “Bulk and Dimensional Requirements” for property located within the “R-2 One Family Limited Residential” zone, and a variance to Section 2.07.040(3) “Changes Permitted to Non-Conforming Uses” which states structures conforming to use may not be altered or extended if it further deviates from the regulations. The bulk and dimensional requirements in the R-2 zone states that principal structures are required to have a minimum setback of 20 feet from the front property line. The applicant is requesting a variance to this section to reduce the required setback to 0 feet, in order for a partially built deck to be compliant with the zoning regulations. Additionally, the applicant must request a variance to the section of the regulations pertaining to changes permitted to non-conforming uses because the partially constructed deck is an expansion into the setback, further deviating

from the regulations. According to the Computer Assisted Mass Appraisal (CAMA) report maintained by the Montana Department of Revenue, the existing residential structure was constructed in 1930 and is considered a non-conforming structure. The structure was built directly on the front property line, and the existing chimney actually extends over the front property line.

In 2010 a violation complaint was submitted to the Flathead County Planning and Zoning Office alleging that the applicant was expanding the existing structure further into the setback. According to Section 2.07.040(3) of the Flathead County Zoning Regulations, *“a building or structure conforming with respect to use but non-conforming with respect to height, setback, or lot coverage may be altered or extended if the alteration or extension does not further deviate from these regulations.”* It was determined in 2010 that the applicant was extending the residential structure within the footprint of an existing deck, which was over three feet in height. ‘Structure’ is defined in the zoning regulations as *“a combination of materials constructed and erected permanently on the ground or attached to something having a permanent location on the ground including buildings and signs. Not included are residential fences less than six feet in height, retaining walls, rockeries and similar improvements of a minor character less than three feet in height.”* [Section 7.18.200 FCZR] Therefore, the deck in 2010 was considered part of the existing structure, and constructing a permanent foundation with enclosed walls within the legal non-conforming deck footprint was not a violation of zoning. The file was closed on August 10, 2010.

Prior to the file being closed, a Zoning Administrator Interpretation was written on April 19, 2010 indicating that the conversion of the deck into internal home-space was permitted as it did not further deviate from the regulations. Also discussed within the Zoning Administrator Interpretation was that the applicant had proposed a *new* deck which would include portions constructed within the established setback. The applicant was informed at that time both verbally and in writing that a new proposed deck within the required setbacks would not be allowed as it would be a further deviation from the setback requirements of the regulations. On May 13, 2010 the applicant and his technical representative Marc Liechti, appeared before the Flathead County Board of Commissioners looking for guidance on resolving an issue related to the dedicated road adjacent to the subject property, and extending the proposed deck. Mr. Liechti stated a deck would not encroach anymore across the property line than it did before and that they were informed they could apply for a variance if they wanted to build the deck. BJ Grieve, the Assistant Planning Director at that time, explained that the applicant was notified that applying for a variance was an option, as it is for any citizen who feels the regulations are burdensome; however, a variance can only be supported if during the review it is determined that a denial of reasonable use of the property exists due to the imposition of the regulation. Additionally, on May 14, 2010, Mr. Grieve emailed a reply to Mr. Liechti’s inquiry regarding clarification of the applicant’s property setbacks. In the email, it was explained that the applicant’s lot is an ‘interior lot’ per Section 7.12.080 FCZR, and that since the dedicated County road adjacent to the subject property is considered a road, the ‘front’ of the lot is the west property line per Section 7.12.070 FCZR.

Therefore, the setbacks would be 20 feet from the road (west property line), 10 feet from the sides (south and north property lines), and 20 feet from the rear (east property line).

On October 22, 2012 it was brought to staff's attention by a zoning violation complaint that the applicant was constructing a new 'L' shaped deck addition greater than 3 feet in height onto the already expanded structure. As previously stated, since the deck addition is located more than 3 feet in height, it is considered part of the structure per Section 7.18.200 FCZR and must comply with all setback requirements of the R-2 zoning. The applicant was issued a stop work order on October 31, 2012. Later that afternoon the applicant met with staff to discuss the violation and was told to remove the portion of the structure in violation. Instead, the applicant decided to first pursue a zoning variance in order to resolve the apparent zoning violation and bring the newly constructed deck into compliance with the R-2 zoning regulations. An application was submitted on November 21, 2012. On January 7, 2013 the applicant withdrew their application for a variance request because *'some of the relief sought simply cannot be granted.'*

Since that time, the applicant has removed the portion of the deck which extended over the property line and the portion of the deck which extended into the Lakeshore Protection Zone. The portion of the deck within the front setback, as well as the roof and eaves, is still currently in place. The portion of the deck within the required setback is 11 feet wide by 20 feet long, and is approximately 220 square feet. Additionally, the proposed roof eaves currently extend over the property line and if the variance is approved, the eaves would need to be removed so that they were directly in line with the edge of the structure. If not approved, the eaves may extend up to 2 feet into the setback.

F. Compliance with Public Notice Requirements

Notification was mailed to adjacent property owners within 150 feet of the subject property on July 16, 2013, 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 July 21, 2013 edition of the Daily Interlake.

G. Agency Referrals

Agency referrals were sent to agencies listed below regarding the variance request.

- Wendee Jacobs, Flathead City-County Environmental Health Department
 - Reason: The property is located within the department's jurisdiction, and may require approval by their office.
- Joe Russell, Flathead City-County Environmental Health Department
 - Reason: The property is located within the department's jurisdiction, and may require approval by their office.
- Dave Prunty, Flathead County Public Works Department
 - Reason: The property is accessed from a public roadway, and is adjacent to a dedicated County road.

- Somers Fire Department
 - Reason: The property is located within the Fire District, and has the potential to impact their facilities.
- Lakeside County Water & Sewer District
 - Reason: The property is located within the department's jurisdictions, adjacent to a recorded easement with a lift station, and has the potential to impact their facilities.
- Marc Pitman, Department of Natural Resources and Conservation
 - Reason: The property is located adjacent to Flathead Lake, and has the potential to impact water resources.

III. COMMENTS RECEIVED

A. Public Comments

No written public comments have been received to date regarding the variance request. It is anticipated any individual wishing to provide public comment on the application will do so during the public hearing at the Board of Adjustment meeting scheduled for August 6, 2013.

B. Agency Comments

Comment was received from the following agencies.

- Wendee Jacobs, Flathead City-County Environmental Health Department
 - Comment: No comments to forward regarding the zoning variance.
- Dave Prunty, Flathead County Public Works Department
 - Comment: Since the applicant has removed the porch located on the County Right Of Way, the County Road Department does not have any other comments regarding his requested setback.
- Marc Pitman, Department of Natural Resources and Conservation
 - Comment: My review of the subject request is limited to water rights or floodplain development requirements. I have no comments to offer in either of these areas on this zoning 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 request, as well as suggested findings of fact based on review of each criterion. It should be noted Section 2.05.030 of the Flathead County Zoning Regulations states "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 currently owns four adjacent properties, Lots 6A-TR1, 6A-TR2, 6B-TR1 and 6B-TR2 of Whipps Point Caroline Villa Sites Subdivision. Staff contacted the Flathead County Plat Room and determined that the four parcels do not have separate legal descriptions

and at this time they must be conveyed together. This means that the tracts cannot be sold individually. According to the Flathead County Zoning Regulations (FCZR), “*where two or more lots are used as a building site and where main buildings cross lot lines, then the entire area shall be considered as one lot....*” [Section 5.08.010(1) FCZR] As shown in Figure 3 below, Certificate of Survey #18617 shows the property as one tract, and does not separate out the four parcels individually since they must convey together.

Within the R-2 zoning, a single-family dwelling is a permitted use. Therefore, the applicant already has a reasonable use of the property with the existing non-conforming single-family home. In 2010 the applicant was able to expand the structure to enclose the existing non-conforming deck because the deck was over three feet in height and considered part of the non-conforming structure. The application submitted for the variance request states that strict compliance with the setback requirements would limit the reasonable use of the property because the property acreage is significantly smaller than what was originally contemplated under the R-2 zoning. The Flathead County Zoning Regulations states that a property in an R-2 zone must have a minimum of 20,000 square feet. According to the applicant’s submittal, the property is 67 feet wide by 104 feet deep, which yields 6,968 square feet. That is approximately 1/3 of the required square footage for an R-2 zone. The applicant states that the property cannot comply with the existing regulations.

However, when the applicant enclosed the previous deck in 2010, they were informed that they could not build another deck off the second story within the 20 foot setback. The house as existing was non-conforming, including the previous deck which the applicant enclosed. Therefore, the applicant had a reasonable use of the significantly smaller property with the previous deck. As they chose to enclose the old deck, they created the hardship themselves in regards to the new deck. Strict compliance would not limit the reasonable use of the property because the applicant could also build a small deck outside of the established setback.

In order to be compliant with the R-2 zoning regulations, the portion of the deck within the 20 foot setback, which is approximately 220 square feet, would need to be removed. (See Figure 6.) When the applicant was enclosing the previous deck in 2010, they could have constructed a doorway on the west or east side of the building granting additional access out of the structure, or moved the existing doorway on the north side of the second story further eastward to grant access outside of the established setback. (See location of glass doors in Figure 4.) Based on the property topography, there is no reason why a door may *only* be constructed on the north side of the house. Therefore, the applicant is not being denied a reasonable use of the property as there are other ways to access the property from the existing structure which would not encroach further into the setback. Furthermore, the applicant constructed a stairway on the east

side of the residential structure which is compliant with the zoning, providing access to the waterfront from the deck.

Figure 3: Certificate of Survey #18617 on file with the Plat Room.

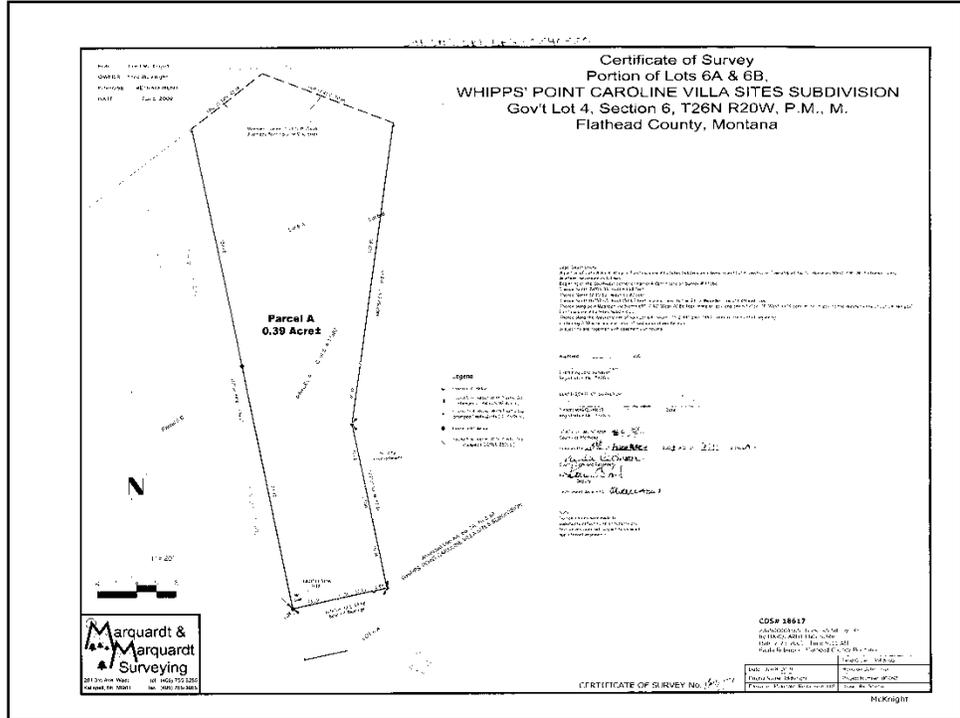


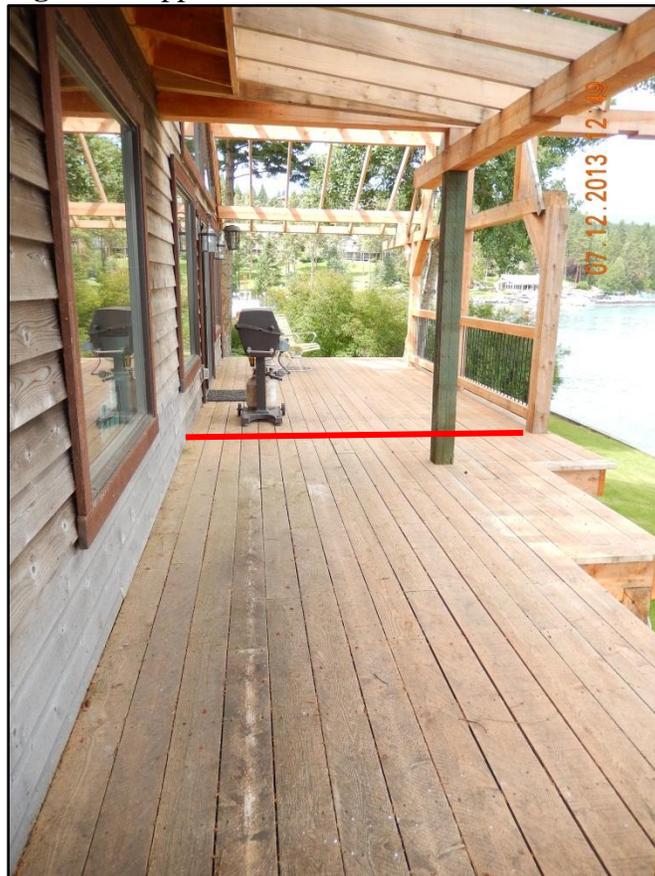
Figure 4: Existing doorways on the north side of the structure.



Figure 5: Existing doorway on the north side below the new deck.



Figure 6: Approximate location of 20 foot setback on deck area.



Finding #1 - Strict compliance with the regulations would not limit the reasonable use of property because the existing residential home is a permitted use within the R-2 zoning, the applicant could have constructed a smaller deck outside of the 20 foot setback accessing the east half of the second story and was informed of this in 2010 prior to the construction of the new deck, there is already an existing entry on the north side of the structure located below the newly constructed deck granting access to the lake, and the applicant could have constructed a doorway on the east or west side of the structure in 2010 to establish other access points to the lake which would not encroach further into the setbacks.

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

The neighborhood in which the subject property is located is predominantly residential. The R-2 zoning establishes single-family dwellings as a permitted use within the district. The existing single family residence is considered non-conforming with respect to setbacks because it was constructed prior to the establishment of the Caroline Point Zoning District on January 21, 1987. In 2010 the applicant was permitted to expand the structure to enclose the existing non-conforming deck. This was permitted because the previous deck was over 3 feet in height and therefore considered part of the existing non-conforming structure. As long as the deck was not further expanded, the structure was not in violation. The definition of ‘setback’ states that it is the distance between the property line and the building line. [Section 7.18.045 FCZR] ‘Building line’ is defined as *“that part of the building nearest the property line including building corners, faces, covered decks or porches and decks over three feet in height.”* [Section 7.03.100 FCZR] Therefore, if a deck structure is less than 3 feet in height and it is uncovered, it does not have to comply with the setback requirements of the R-2 zoning.

Many of the adjacent properties are approximately the same size as the subject property and have constructed single family dwellings. Some of the structures have decks or porches both covered and uncovered. However, staff is not able to enter the properties to determine if they are compliant with the R-2 setbacks. Additionally, as with the applicant’s structure, they may also be legally non-conforming structures and not have to comply with the R-2 setbacks. As a result, strict compliance with the R-2 zoning would not deprive the applicant of rights enjoyed by other adjacent properties because the applicant could construct an uncovered deck or porch less than 3 feet in height, attached to the lower level of existing structure (see Figure 4 & 5 above), which would be in compliance with the zoning regulations. Additionally, the applicant could construct a deck over 3 feet in height if it was located outside of the 20 foot setback, and would therefore access the eastern half of the second story.

The subject property also borders a dedicated County road. If approved, the new deck would have a zero lot line with the County property. While a zero lot line does not appear to impact an adjacent residence, it would allow the applicant to be granted a special privilege, compared to other landowners in the surrounding area. The additional area to the west of the property creates a buffer between the applicant's residence and the neighbor to the west. If the road was not there, the applicant's residence would be extending over the property line (eaves currently extend 2 feet over the property line) and creating a potential safety hazard. Additionally, the neighbor along the County road to the west has not constructed any portion of their structure on the property line. (See Figure 8.) If the applicant's request is granted, the adjacent neighbor would be able to use the same considerations to expand their structure. Therefore, the applicant is not being denied a right enjoyed by other surrounding property owners along the dedicated County road.

Figure 7: View of applicant's property line from County road.



Figure 8: View of western neighbor from County road.



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 single-family residences are a permitted use within the R-2 zoning, the applicant could have constructed an uncovered deck less than 3 feet in height from the ground floor which would not have to be compliant with the zoning regulations, the applicant could have constructed a deck over 3 feet in height if it was located further to the east along the north side of the structure outside of the 20 foot setback, and granting the variance would allow a special privilege to the applicant that other landowners in the area are denied.

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

The subject property is approximately 0.39 acres per Certificate of Survey #18617. The original subdivision which created the lots was filed in 1925. According to the Computer Assisted Mass Appraisal (CAMA) report, the residential structure was originally constructed in 1930, prior to the adoption of the Caroline Point Zoning District on January 21, 1987. When it was originally built, the structure was placed directly on the western property line. The existing chimney is actually located over the property line onto the adjacent dedicated County road. (See Figure 6 below) Therefore, the residential structure is considered non-conforming with regards to setbacks under Section 2.07 of the Flathead County Zoning Regulations and “*may continue in the manner and to the extent that it existed or water being used at the time of adoption of these regulations.*” [Section 2.07.010 FCZR]

As stated previously, the existing lot is approximately 6,968 square feet or approximately 1/3 of the required minimum lot size in an R-2 zone. Additionally, the applicant has indicated in the variance application that the property has been in their family since the 1970s, prior to the adoption of the zoning district. Therefore, the applicant has been aware of the bulk and dimensional requirements of the R-2 zoning since its adoption in 1987.

In 2010 the applicant enclosed the non-conforming deck structure, increasing the actual residential space. At that time, the applicant was informed that an additional deck could not be constructed within the 20 foot front setback because it would be an expansion of a non-conforming structure which is not permitted under Section 2.07.040(3) which states, "*a building or structure conforming with respect to use but non-conforming with respect to height, setback, or lot coverage may be altered or extended if the alteration or extension does not further deviate from these regulations.*" The submitted application indicates the hardship is the result of the lot's size and the location of the existing structure in relation to the property line, both of which the applicant had no control over. While the applicant did not own the property when the lot was created or the residential structure was originally built, they were the owner during the previously permitted expansion. Furthermore in 2010, they were aware that a new constructed deck would not be permitted as it is an expansion of the non-conforming use further deviating from the regulations, and were informed of this verbally, in writing, and in front of the County Commissioners at a meeting on May 13, 2010. Therefore the hardship has been created by the applicant, and is not the result of circumstances the applicant had no control over.

Figure 9: Location of existing non-conforming chimney and eave extension over the western property line (facing north).



Finding #3 – Although the applicant was not the owner of the property when the lot or residential structure was originally created, the hardship being claimed in the submitted application is not the result of circumstances over which the applicant had no control because their family has owned the property since prior to the zoning district adoption, it was created by the applicant as they enclosed the original deck in 2010, and were informed verbally, in writing, and in front of the County Commissioners that a new constructed deck would not be permitted under the zoning in place.

C. The hardship is peculiar to the property.

The majority of the tracts along Caroline Point Road are similarly sized as the subject property, and range between approximately 0.1 and 0.8 acres in size. The applicant's property is approximately 0.3 acres, and is therefore typical of the buildable lots in the surrounding area. The existing residential structure was built prior to the creation of the Caroline Point Zoning District and was constructed directly on the western property line or front property line. Therefore it is a non-

conforming structure with respect to the applicable R-2 front setbacks and may continue in the location and extent to which it was constructed per Section 2.07.010 FCZR. Many of the structures built on adjacent properties were also constructed prior to the creation of the zoning district. The CAMA data available for adjacent properties both east and west establish building construction dates between 1938 and 1950. Additionally, many of the properties also list decks or porches as additional building enhancements.

In 2010 the applicant enclosed the previous non-conforming deck as it met the definition of structure found in the zoning regulations since it was over 3 feet in height. At that time, the applicant was informed that the non-conforming structure was a permitted use however it could not be expanded to further deviate from the regulations per Section 2.07.040(3) FCZR. Although the applicant is not permitted to construct a deck on the west side of the structure (front property line), the definition of structure only pertains to covered decks and decks over three feet in height. Therefore, the applicant could construct a deck on the north side of the residence which is less than three feet in height and uncovered, which would not be required to comply with the setbacks found in the R-2 zoning. However, since the applicant built the new deck onto the residential structure within the front setback they created the hardship, and it is not peculiar to the individual property.

In the submitted variance application, reference is made to the I-1H zoning and a provision in that section which states *'where a lot is previously developed and a primary building encroaches into the setback, the existing building line of the primary building shall be used as the setback line for future development.'* [Section 3.28.040(4)(A) FCZR] The applicant states that because this is not permitted in the R-2 zone it raises an equal protection issue. Staff has been unable to determine when this section was added to the I-1H zone, or if it has been included since the zoning regulations were first adopted. However, the definition of the I-1H zone states it is intended to be for *'industrial areas which are located along state and federal highways and contain greater levels of performance and mitigation utilizing increased setbacks, landscape buffering, access control and signage restrictions for the purpose of protecting the County's major travel ways from unnecessary encroachments....'* [Section 3.28.010 FCZR] The character of the I-1H district allows for altered bulk and dimensional requirements, as well as different permitted and conditional uses. This cannot be compared to an R-2 zoning and its specific development standards, as an R-2 zone is defined as *'a district to provide for large-tract residential development. These areas will typically be found in suburban areas, generally served by either sewer or water line.'* [Section 3.10.010 FCZR] According to the Flathead County Attorney's office, an equal protection issue can only be raised if two parties or properties are similarly situated and comparable. The subject property is residential, which cannot be compared to an industrial property located along a state or federal highway.

Figure 10: View of the existing deck within the 20 foot setback (facing south).



Finding #4 – The hardship claimed by the applicant is not the result of a unique or peculiar situation on the applicant’s property because adjacent properties are similarly sized, the applicant could construct a deck on the north side of the residence less than 3 feet in height and uncovered so as to not meet the definition of structure, the applicant created the hardship themselves by constructing the deck over the property line even after they were informed it was not permitted, and the residential property cannot be compared to an industrial property located along a state or federal highway as it is not similarly situated.

D. The hardship was not created by the applicant.

As discussed under Criteria IV.A, IV.B, and IV.C above, the applicant constructed the new deck addition onto the existing residence extending the structure further into the front setback. The residential structure was originally constructed in 1930 prior to the applicant owning the property, and before the Caroline Point Zoning District was adopted. However, in 2010 when the applicant was enclosing the original non-conforming deck into part of the residential structure, the R-2 zoning had been adopted and there were established setbacks for the property. The applicant was informed at that time that an additional deck could not be constructed on the newly expanded residence within the front setback because it would further deviate from the regulations and is therefore not a permitted change to a non-conforming structure as outlined under Section 2.07.040(3) FCZR. Therefore, when the applicant constructed the recent

deck addition they created the hardship themselves by further extending the deck within the front setbacks, deviating from the established location and extent of the original non-conforming structure.

Based on staff's site visit, it appears there is some space on the subject property for the applicant to construct a deck or patio onto the northern side of the residence; however to maintain compliance with the established zoning, the deck would need to be less than 3 feet in height and uncovered, or be constructed outside of the required setbacks. Currently a portion of the existing deck, approximately 249 square feet, is located outside of the required setback. The compliant deck area is rectangular shaped approximately 9 feet wide by 5 ½ long, with another smaller rectangular shaped deck attached approximately 7 feet wide by 7 ½ feet long. There is also a smaller deck along the east side of the structure approximately 4 feet wide by 12 feet long and 6 feet wide by 7 ½ feet long, connected to stairs 3 ½ feet wide by 10 feet long. The applicant states in their application that due to the size of the property, *'the ability to expand in a usable direction and to have a deck facing the lake which should be of adequate size is a reasonable expectation for this type of property.'* The term 'adequate size' is vague regarding how large a deck should be permitted. Considering the existing deck located outside of the setbacks is approximately 249 square feet, it appears to be of adequate size for the property owner to utilize for views and access to the lake. (See Figures 11 and 12.) Additionally, as previously mentioned, when the applicant built the new deck, they could have arranged the deck to meet the setbacks and move the existing doorway onto the deck further east to facilitate access. Therefore, the encroachment was created by the applicant and there is no recognized hardship.

Figure 11: Area of deck outside of the 20 foot setback.

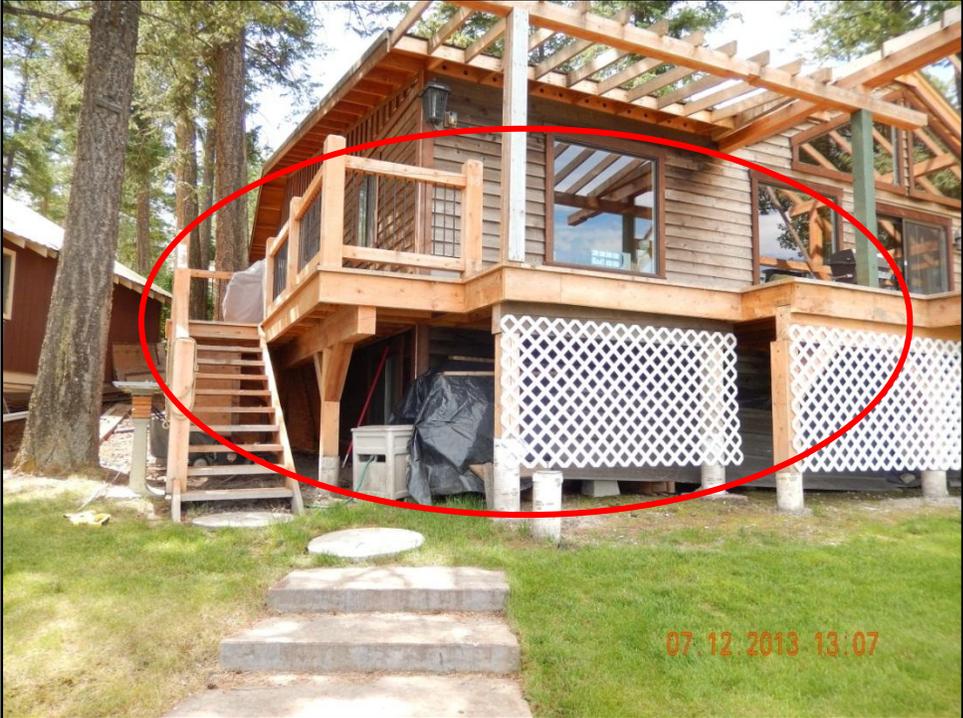


Figure 12: Approximate location of 20 foot setback on existing deck. This area plus the deck located on the east side of the structure (in above picture) is approximately 249 square feet.



Finding #5 – The hardship claimed by the applicant was created by the applicant because the addition was constructed onto the residential structure after the Caroline Point Zoning District had been adopted, the applicant had been informed in 2010 that a new deck could not be constructed because it would further deviate from the regulations, and it appears the deck area that is currently in compliance is already of adequate size for the applicant to utilize for views and access to the lake.

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

The applicant has stated in the submitted application that the portion of the deck within the 20 foot setback has not been removed because *‘should this variance be granted, the cost would be tripled to put the portion back on. Should this request be denied, the entire deck may have to come down as not being serviceable.’* Therefore, the applicant implies that the reasoning for the variance is economic. They do not want to pay for the removal of the deck, or pay for the deck to be reconfigured if it is structurally unsound with the non-compliant area removed. The applicant created the hardship when they constructed the deck, knowing there were setbacks within the R-2 zoning. The applicant is requesting the variance in order for the deck to come into compliance. However, as previously stated in the above sections, the original structure was non-conforming with respect to the front setback and to its location on the property. In 2010 when the applicant was enclosing the old deck, the Planning and Zoning office informed the applicant that a new deck structure could not be constructed within the 20 foot setback as it would violate Section 2.07.040(3) FCZR by further deviating from the regulations. At that time, the applicant could have constructed the deck on the second story of the structure to be in compliance with the regulations, or outside of the 20 foot setback. If the deck was less than 3 feet in height it would not be considered part of the structure, and therefore not have to comply with R-2 setbacks. Although removal would require some structural reconfiguration and may be economically burdensome, it is possible to be completed, and it could have been constructed this way to begin with.

Finding #6 – The hardship claimed by the applicant does appear to be economic because the applicant is requesting the variance to bring the deck into compliance when they constructed the new deck onto the structure; the applicant implies that the reasoning behind not removing the portion of the deck currently is economic; and although removal would require structural reconfiguration, the applicant could remove the portion of the deck built within the front setback.

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

The proposed variance has the potential to affect the western adjacent property, yet it does not appear to be adversely negative. While the proposed variance is to bring the constructed deck into compliance with the R-2 zoning, the existing non-conforming residential structure is currently located on the western property line within the front setback. Since the new deck is greater than 3 feet in height, it is

considered part of the structure and must comply with setbacks outlined in the R-2 zoning. The applicant is requesting a variance to allow a setback of 0 feet, for the deck to be permitted directly adjacent to the western property line with a 'zero lot line.'

The property adjacent to deck on the west side is a dedicated County road, approximately 20 feet wide until it reaches the corner of the original grandfathered structure. Then the road widens to approximately 30 feet and continues at that width until it intersects with Flathead Lake. The majority of the dedicated County road is covered in gravel, however, the road changes to grass near the southwestern corner of the newly constructed deck. Therefore, it does not appear the deck would greatly restrict the ability for public citizens to reach the lake. However, the deck location does make it more awkward for people to distinguish the actual location of the County property. Currently the deck's roof extends over the property line into the County property. If the variance were to be approved, the roof would still need to be modified so that no portion extends over the property line, including the eaves.

Figure 9: Extension of the deck adjacent to the dedicated County road, and extension of eaves over property line.



Finding #7 – While granting of the variance request has the potential to create a significant impact on the neighboring property and the public, at this time it does not appear the impact would be negative because the deck addition would not limit the ability for the public to access the lake even though it may make it confusing for citizens to distinguish the actual location of the County property, and if approved, a condition could be added so that the deck and roof would not extend over the western property line.

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

As discussed in previous sections, the applicant constructed the deck onto the existing residential structure, directly in violation of the R-2 zoning [Section 3.10.040(3)(A) FCZR] and Changes Permitted to Non-Conforming Uses [Section 2.07.040(3) FCZR]. Now, the applicant is requesting a variance to bring the deck into compliance with the regulations. The variance requests a setback of 0 feet to establish a ‘zero lot line’ with the adjacent property. Therefore, the minimum distance needed in order to alleviate the setback problem would be a variance to the requirement of 20 feet from the front property line. However, the applicant does have the alternative of removing the deck or the portions within the setback area, which was knowingly built out of compliance with the zoning (see letter of April 19, 2010 and Commissioners’ minutes of May 13, 2010), and re-establish the residential structure to its non-conforming grandfathered status as it was permitted in 2010. At that time, the applicant had the ability to design a deck compliant with the zoning regulations. Therefore the applicant does not appear to have a valid hardship. Many properties along the lakefront, especially older homes do not have room to construct a deck because they are not permitted within the 20 foot Lakeshore Protection Zone or they cannot meet impervious coverage allowance. The fact that the applicant has the room to build even a moderate sized deck proves the applicant does not have a valid hardship.

Finding #8 – While the variance requested is the only variance which would alleviate the perceived hardship claimed by the applicant, there is no hardship because other alternatives exist to remedy the setback violation including removing the entire deck to revert the residential structure back to the non-conforming status established in 2010, or removing the portions of the deck constructed on the north side of the structure within of the required 20 foot setbacks.

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

Granting the requested variance will confer a special privilege for the applicant that other properties in the district are denied because it would permit the applicant to expand the non-conforming structure within the established front setbacks. The residential structure was originally built around 1930 and constructed directly on the western property line. As previously stated, in 2010 the applicant enclosed the previous non-conforming deck into additional living space in the non-conforming residential structure. At that time, the applicant was

informed by Planning and Zoning staff both verbally and in writing that a new deck could not be constructed within the setbacks because it would further deviate from the regulations as established in Section 2.07.040(3) FCZR.

While Flathead County does not have a building department, it is the individual property owner's responsibility to comply with all local regulations including zoning. It is important to note that, in this case the adjacent property is an actual dedicated County road owned by Flathead County located in the Whipps Point Caroline Villa Sites Subdivision. If approved, the new deck would have a zero lot line with the County property. While a zero lot line does not appear to impact an adjacent residence, it would allow the applicant to be granted a special privilege, compared to other landowners in the surrounding area. The County property creates a buffer area between the applicant's residence and the neighbor to the west. If it was not there, the applicant's residence would be extending over the property line, as the eaves currently extend 2 feet over the property line. Additionally, the neighbor to the west has not constructed any portion of their structure on the property line. If the applicant's request is granted, the adjacent neighbor would be able to use the same considerations to expand their structure. Therefore, the applicant is not being denied a right enjoyed by other surrounding property owners along the dedicated County road, and cannot be treated differently than any other resident in Flathead County.

Finding #9 – Granting of the variance would confer a special privilege that is denied to other properties in the district because other lots in the district with similar buildable areas are not permitted to modify their existing structures to be out of compliance with the zoning regulations when other viable options are available, and the applicant cannot be treated differently than any other resident in Flathead County.

V. SUMMARY OF FINDINGS

1. Strict compliance with the regulations would not limit the reasonable use of property because the existing residential home is a permitted use within the R-2 zoning, the applicant could have constructed a smaller deck outside of the 20 foot setback accessing the east half of the second story and was informed of this in 2010 prior to the construction of the new deck, there is already an existing entry on the north side of the structure located below the newly constructed deck granting access to the lake, and the applicant could have constructed a doorway on the east or west side of the structure in 2010 to establish other access points to the lake which would not encroach further into the setbacks.
2. Strict compliance with the regulations would not deprive the applicant of rights enjoyed by other properties similarly situated in the same district because single-family residences are a permitted use within the R-2 zoning, the applicant could have constructed an uncovered deck less than 3 feet in height from the ground floor which would not have to be compliant with the zoning regulations, the applicant could have constructed a deck over 3 feet in height if it was located further to the east along the north side of the

structure outside of the 20 foot setback, and granting the variance would allow a special privilege to the applicant that other landowners in the area are denied.

3. Although the applicant was not the owner of the property when the lot or residential structure was originally created, the hardship being claimed in the submitted application is not the result of circumstances over which the applicant had no control because their family has owned the property since prior to the zoning district adoption, it was created by the applicant as they enclosed the original deck in 2010, and were informed verbally, in writing, and in front of the County Commissioners that a new constructed deck would not be permitted under the zoning in place.
4. The hardship claimed by the applicant is not the result of a unique or peculiar situation on the applicant's property because adjacent properties are similarly sized, the applicant could construct a deck on the north side of the residence less than 3 feet in height and uncovered so as to not meet the definition of structure, the applicant created the hardship themselves by constructing the deck over the property line even after they were informed it was not permitted, and the residential property cannot be compared to an industrial property located along a state or federal highway as it is not similarly situated.
5. The hardship claimed by the applicant was created by the applicant because the addition was constructed onto the residential structure after the Caroline Point Zoning District had been adopted, the applicant had been informed in 2010 that a new deck could not be constructed because it would further deviate from the regulations, and it appears the deck area that is currently in compliance is already of adequate size for the applicant to utilize for views and access to the lake.
6. The hardship claimed by the applicant does appear to be economic because the applicant is requesting the variance to bring the deck into compliance when they constructed the new deck onto the structure; the applicant implies that the reasoning behind not removing the portion of the deck currently is economic; and although removal would require structural reconfiguration, the applicant could remove the portion of the deck built within the front setback.
7. While granting of the variance request has the potential to create a significant impact on the neighboring property and the public, at this time it does not appear the impact would be negative because the deck addition would not limit the ability for the public to access the lake even though it may make it confusing for citizens to distinguish the actual location of the County property, and if approved, a condition could be added so that the deck and roof would not extend over the western property line.
8. While the variance requested is the only variance which would alleviate the perceived hardship claimed by the applicant, there is no hardship because other alternatives exist to remedy the setback violation including removing the entire deck to revert the residential structure back to the non-conforming status established in 2010, or removing the portions of the deck constructed on the north side of the structure within of the required 20 foot setbacks.
9. Granting of the variance would confer a special privilege that is denied to other properties in the district because other lots in the district with similar buildable areas are not permitted to modify their existing structures to be out of compliance with the zoning

regulations when other viable options are available, and the applicant cannot be treated differently than any other resident in Flathead County.

VI. CONCLUSION

Section 2.05.030(3) of the Flathead County Zoning Regulations states a variance shall not be granted unless all of the review criteria have been met or are found not to be pertinent to a particular application. Based upon the 9 draft findings of fact presented in this staff report, which are based on staff's research and the applicant's information, the variance request does not appear to meet all eight criteria for review.