

WALLOWA COUNTY PLANNING COMMISSION

WALLOWA COUNTY COURTHOUSE
101 S. RIVER STREET, ROOM B-1
ENTERPRISE, OR 97828

IN THE MATTER OF AN APPEAL OF)
VARIANCE VAR 07-03 REGARDING A) **FINDINGS OF FACT,**
MINISTERIAL DECISION OF AN AREA) **CONCLUSIONS, AND DECISION**
VARIANCE) **OF THE WALLOWA COUNTY**
) **PLANNING COMMISSION**
)

Eveson Appeal APP#09-01, Appeal of Variance VAR#07-03

After Mr. Eveson was officially notified of the variance decision on July 23, 2009, his request for an appeal was received on August 7, 2009 and was properly advertised in the Wallowa County Chieftain on September 17 and November 12, 2009 and January 14, 2010. Applicable property owners and appellants were notified by mail on September 10, 2009. The request came before the Wallowa County Planning Commission for Hearing initially on September 29, 2009, and was reviewed at each Commission meeting through February 23, 2010 with decision on March 30, 2010. (There was no December meeting). These findings are for appeal of a ministerial decision, specifically, Variance VAR#07-03. The Planning Commission, having reviewed the record, the materials introduced in the above-referenced hearing, and having heard and considered oral testimony in the above-referenced hearing, and being fully advised, makes the following findings of fact and decision.

01. **APPELLANT:** Ray Eveson
02. **REPRESENTATIVE:** Same
03. **REQUEST:** Appeal of VAR# 07-03
04. **REVIEW CRITERIA:** Article 1, Introductory Provisions, Section 1.065 (005); Article 5, Public Hearing Review, Sections 5.025(01-03) and 5.030; Article 7, Appeals; Article 10, Variance Procedure, Sections 10.015 and 10.025; Article 54, Resort Residential, Section 54.035 (04); ORS 197.825 (2) and 197.830 (3); and any other applicable ordinances or goals of the Wallowa County Land Development Ordinance and/or laws of the State of Oregon.

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SECTION 1.065, DEFINITIONS: For the purpose of this ordinance and as used in this ordinance, the following words and phrases are so defined:

005. **ADVERSELY AFFECTED** - A party's use and enjoyment will be negatively impacted by a land use decision due to identified consequences from the proposed use or development. Examples of adverse affects may include noise, odors, increased traffic, or potential flooding.

FINDING 4.1: The Planning Commission finds that via testimony and material submitted into the record, Mr. Eveson has shown that the presence of Mr. Wimer's replacement building has had an adverse impact. Snow, ice and rain run-off now falls from the new building into an area that Mr. Eveson has used for camping for years. Also a large window in the new building overlooks the area used for camping.

As a result of this adverse impact, the Commission finds that Mr. Eveson has standing to appeal.

SECTION 5.025, NOTICE OF PUBLIC HEARING:

01. Public Hearing Review requires notice of hearing be given to all owners of property lying within:
- A. One hundred (100) feet of the exterior boundary of the subject property where the subject property is wholly or in part within an urban growth boundary;
 - B. Two hundred and fifty (250) feet of the exterior boundary of the subject property where the subject property is outside an urban growth boundary and not within a farm or forest zone;
 - C. Seven hundred and fifty (750) feet of the exterior boundary of the subject property where the subject property is within a farm or forest zone.

The Director will provide notice to other parties should it be determined their interests may be affected by the proposal or they have other need for notice. The notice shall be mailed or otherwise delivered no later than ten days prior to the hearing date.

02. Notice of public hearing shall be placed in a newspaper of general circulation no later than 10 days prior to the hearing date nor greater than twenty 20 days prior to the hearing date.
03. Notice of public hearing shall be posted on the Wallowa County Courthouse Public Notice Board no later than 10 days nor greater than 20 days prior to the hearing date.

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FINDING 4.2: The Planning Commission finds the public hearing was properly noticed to the appellant, Mr. Wimer, and all other property owners within 250 feet of the subject property, in a newspaper of general circulation and was posted on the Wallowa County Courthouse Public Notice Board prior to the hearing within the required time frame. See discussion above.

SECTION 5.030, CONDUCT AND ORDER OF HEARING: The rules of conduct and the order of the public hearing shall be as prescribed in the Wallowa County Conduct of Hearings Ordinance unless supplemented by rules adopted prior to the commencement of the evidentiary portion of the hearing.

FINDING 4.3: Prior to the commencement of the evidentiary portion of the hearing the Planning Commission adopted the Quasi-Judicial procedures as rules of conduct for the hearing.

SECTION 7.015, APPEAL AUTHORITY:

01. Decisions by the Planning Director shall be subject to appeal to the Planning Commission.
02. Decisions by the Planning Commission shall be subject to appeal to the Wallowa County Court.
03. Decisions reached by the Planning Commission in its capacity as an appellate body shall be subject to appeal to the Wallowa County Court.
04. Nothing in this ordinance shall prevent appeal to the State Land Use Board of Appeals (LUBA), as provided by ORS Chapter 197.
05. Appeal of a decision to the Land Use Board of Appeals (LUBA) shall follow the requirements of ORS 197.805 through 197.860.

FINDING 4.4: The subject of the appeal is a ministerial decision, VAR#07-03, made by the Planning Director, therefore, the Commission finds that the appeal was correctly heard by the Planning Commission and that the Planning Commission has jurisdiction over this appeal. See Findings 4.15 and 4.16 below.

SECTION 7.020, INITIATION OF APPEAL: A decision of a review authority, pursuant to this ordinance, may be appealed by a party with standing to appeal and within the prescribed time limits. The filing of an appeal shall be accompanied by the fee prescribed by resolution of the Wallowa County Court. The appeal document which is filed shall list at least the following information.

01. An identification of the decision sought to be reviewed including the date of the decision.

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02. A statement of the interest of the person seeking review and that he/she was a party to the initial proceedings.
03. The specific grounds for appeal as they relate to relevant review criteria.

FINDING 4.5: On August 7th, 2009, the Planning Department received from the appellant an email which contained the above information.

SECTION 7.025, SCOPE OF REVIEW ON APPEAL: The scope of review on appeal shall be restricted to the record made on the decision being appealed, unless the appeal authority issues an order stating the scope to be one of the following:

01. Limited to such issues as the reviewing body determines necessary for a proper resolution of the matter.
02. A De Novo hearing on the merits with new evidence allowed.

FINDING 4.6: The Planning Commission has ruled that the appeal shall be heard De Novo. See Finding 4.9 below.

SECTION 7.030, REVIEW OF THE RECORD:

01. Unless otherwise provided for by the appeal authority, review of the decision on appeal shall be confined to the record of the proceeding as specified in this section. The record shall include:
 - A. An oral or written factual report prepared by the Planning Director.
 - B. All exhibits, materials, pleading, memoranda, stipulations, and motions submitted by any party and received or considered in reaching the decision under review.
 - C. The minutes of the hearing below and a detailed summary of the evidence.
02. The appeal authority shall make its decision based upon the record after first granting the right of argument but not the introduction of additional evidence to any party who has filed a notice of appeal.

FINDING 4.7: The Planning Commission has ruled that the appeal shall be heard De Novo. See Finding 4.9 below.

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SECTION 7.035, NOTICE OF APPEAL HEARING: Notice of the hearing held by an appeal authority to consider an appeal shall be mailed at least ten days prior to the hearing to the appellant and all persons who have standing in the proceeding of the issue on appeal.

FINDING 4.8: The Planning Commission finds that the above criteria have been met. See discussion on page 1.

SECTION 7.040, DE NOVO REVIEW: The appeal authority may decide to hear the entire matter De Novo as defined in Section 1.065. The appeal authority shall consider all of the following in making such a decision.

01. Prejudice to the parties.
02. Convenience or availability of proposed new evidence at the time of the initial hearing.
03. Surprise to opposing parties.
04. The competency, relevancy, and materiality of the proposed new testimony or other evidence.

FINDING 4.9: As the decision subject to the appeal was ministerial and the appellants had no opportunity to testify, the Planning Commission has ruled that this appeal be heard De Novo due to surprise to opposing parties.

SECTION 7.045, APPEAL AUTHORITY DECISION:

01. Upon review; the appeal authority may by order affirm, reverse, modify, or remand in whole or part a determination or requirement of the decision that is under review. When the appeal authority renders a decision that reverses a decision of the hearing body, the appeal authority, in its order, shall set forth its finding and state its reasons for taking the action encompassed in the order.

When the appeal authority elects to remand the matter back to the hearing body for such further consideration as it deems necessary, it shall include a statement explaining the error found to have materially affected the outcome of the original decision and the action necessary to rectify such.

02. Action by the appeal authority shall be decided by a quorum of its members present at the meeting at which review was made and shall be taken either at that or any subsequent meeting. The appeal authority shall render its decision no later than 30 days from the date at which review was made unless otherwise agreed to by the parties and shall file that decision with the County Clerk within twelve days after it is rendered.

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FINDING 4.10: The Planning Commission met in public hearing on February 23, 2010 and a quorum was present. The Commission having reviewed the record, the materials introduced in the above-referenced hearing, and having heard and considered oral testimony in the above-referenced hearing, and being fully advised finds that as the Administrative Review process was not followed, the decision in question is reversed. See Finding 4.11.

SECTION 10.015, REVIEW PROCEDURE: A variance shall be subject to administrative review. If in the opinion of the administrative review authority, the proposed use may be in conflict with the purposes of this ordinance or if objection has been filed by a party entitled to notice, the application will be referred to the public hearing review process.

FINDING 4.11: The record offers no indication that the Administrative Review process was followed regarding Variance VAR#07-03. Therefore, the Commission finds that correct procedure was not followed regarding the approval of VAR#07-03.

SECTION 10.025, REVIEW CRITERIA-AREA VARIANCE: An area variance may be granted subject to any reasonable conditions based upon the following findings:

01. That there are special circumstances or conditions affecting the property that do not normally apply to other property and that such circumstances or conditions make it impossible or impractical to comply with the ordinance.
02. That the exception conforms to the purpose of this ordinance and is necessary for the proper design and/or function of the subdivision or partition.

FINDING 4.12: The Commission finds that Mr. Wimer has testified that he thought he did not need a permit to build a replacement building and that he did apply for a permit and variance when informed that he needed to do so. Also, if the building were moved to conform to setbacks, a large fir tree would need to be removed.

03. That the granting of the exception will not be detrimental to the public welfare or injurious to other property in the area in which the property is situated.
04. That the exception is necessary for the preservation and enjoyment of a substantial property right because of an extraordinary hardship which would result from strict compliance with the regulations of this ordinance.

FINDING 4.13: The Commission finds that the variance was necessary for Mr. Wimer to build his replacement building without the removal of the fir tree. However, the replacement building has twice the floor area and is much taller than the building it replaces. Also the presence

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of a large window overlooking the adjacent property raises privacy concerns. Therefore the Commission finds that the building is “injurious to other property in the area.”

SECTION 54.035, PROPERTY DEVELOPMENT STANDARDS:

04. **SETBACKS:** To insure setback requirements are met, setback and service district easement lines shall be flagged. Before construction is begun, a setback inspection shall be requested by the property owner and may be performed by the Planning Department. Setback measurements shall be to the nearest permanent structure or structural appendage, including patios, decks, eaves, overhangs.

[.....]

SIDE YARD: Not less than 7 feet from the property line.

[.....]

FINDING 4.14: As the Planning Commission has reversed the decision regarding Variance VAR#07-03, Mr. Wimer’s building is now subject to the above setback.

ORS 197.825 Jurisdiction of board; limitations; effect on circuit court jurisdiction. (1) Except as provided in ORS 197.320 and subsections (2) and (3) of this section, the Land Use Board of Appeals shall have exclusive jurisdiction to review any land use decision or limited land use decision of a local government, special district or a state agency in the manner provided in ORS 197.830 to 197.845.

[.....]

(2) The jurisdiction of the board:

(a) Is limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning the board for review;

[.....]

FINDING 4.15: Whereas the VAR#07-03 was approved by the Planning Director and that an appeal of this decision shall be heard by the County Planning Commission (see Finding 4.01), the Commission finds that, this review shall not extend to LUBA until all local remedies have been exhausted and that an appeal of this decision shall be heard by the Board of Commissioners.

ORS 197.830 Review procedures; standing; fees; deadlines; rules; issues subject to review; attorney fees and costs; publication of orders; mediation.

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(3) If a local government makes a land use decision without providing a hearing, except as provided under ORS 215.416 (11) or 227.175 (10), or the local government makes a land use decision that is different from the proposal described in the notice of hearing to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions, a person adversely affected by the decision may appeal the decision to the board under this section:

(a) Within 21 days of actual notice where notice is required; or

(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required.

[.....]

FINDING 4.16: Whereas Mr. Wimer's variance was signed by the Director on July 7th, 2007, and there were conversations between Mr. Eveson and the Director regarding Mr. Wimer's permit, there is nothing in the record regarding the content of these conversations or to show that Mr. Eveson was ever officially informed of the decision or of his appeal rights until July 23rd, 2009. And, as Article 7, Appeals, does not contain a process specific to this occasion, the Commission finds that the above process was reasonable and correct regarding the appeal of Variance VAR#07-03. The Commission understands that this process refers to appeals to the board, however, the Commission has also found that the correct venue in the case, is the Planning Commission (see Finding 4.15).

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06. CONCLUSION:

It is the decision of the Planning Commission that all applicable criteria have been met. Therefore, the Planning Commission finds that the appeal is upheld and the ministerial decision made regarding VAR #07-03 is reversed.

Mr. Wimer's building is now subject to the setbacks of the Resort Recreation zone.

Also, whereas the Commission realizes that the decision regarding the variance in question was made without following correct procedure and that Mr. Wimer may suffer some expense moving his building, the Planning Commission recommends that Mr. Wimer and the County Board of Commissioners engage in mediation to arrive at a reasonable settlement regarding the cost of moving the building.

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07. DECISION:

Based upon the information submitted, the comments of interested parties, and the findings, the review authority finds this request for an appeal satisfies all review criteria and is hereby upheld and the ministerial decision in regarding VAR #07-03 is reversed. The vote on the motion is _____ in favor and _____ opposed with _____ abstaining.

March 30, 2010
DATE OF ACTION

GENE KOZOWSKI, CHAIRMAN
WALLOWA COUNTY PLANNING COMMISSION

This decision may be appealed to the Wallowa County Board of Commissioners pursuant to Article 7, Appeal. The provisions of Notice of Intent to Appeal accompanied by the appeal fee must be received by the Wallowa County Planning Department by 5:00 p.m. April 12th, 2010.

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