

**EL PASO COUNTY**  
  
**COLORADO**

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PLANNING AND COMMUNITY DEVELOPMENT DEPARTMENT  
CRAIG DOSSEY, EXECUTIVE DIRECTOR

**TO: El Paso County Board of Adjustment  
Jay Carlson, Chair**

**FROM: Mercedes Rivas, Planner II  
Lupe Packman, Engineer I  
Craig Dossey, Executive Director**

**RE: Project File #: BOA-21-004  
Project Name: Pixlar Board of Adjustment for Existing Garage  
Parcel No.: 52054-00-007**

**OWNER:**

**REPRESENTATIVE:**

Russel and Brianne Mallery 7575 Pinery Circle Colorado Springs, CO 80908	Sara Frear Mulliken Weiner Berg & Jolivet PC 102 South Tejon Street, Suite 900 Colorado Springs, CO 80903
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**Commissioner District: 1**

Board of Adjustment Hearing Date:	8/11/2021
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**EXECUTIVE SUMMARY**

A request by Russel and Brianne Mallery for approval of a dimensional variance to allow a rear setback of 1.34 feet where a 25-foot setback is required in the RR-5 (Residential Rural) zoning district, in order to allow for an existing garage. The 9.09-acre property is located north of Pinery Circle, approximately 0.6 miles northeast of the Swan Road and Black Forest Road intersection and is within Section 5, Township 12 South, Range 65 West of the 6th P.M.



## **A. REQUEST**

A request by Russel and Brianne Mallery for approval of a dimensional variance to allow a rear setback of 1.34 feet where a 25-foot setback is required in the RR-5 (Residential Rural) zoning district, in order to allow for an existing garage.

## **B. APPROVAL CRITERIA**

Section 5.5.2.B.2.a, Variance to Physical Requirements, of the Land Development Code (2019), states the following:

*The Board of Adjustment is authorized to grant variances from the strict application of any physical requirement of this Code which would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon, the owner of the property. Practical difficulties and hardship, in this context, may exist where the legal use of the property is severely restricted due to:*

- 1) *The exceptional narrowness, shallowness, or shape of the specific piece of property.*

The subject property does not have exceptional narrowness, shallowness, size, or shape. The lot is 9.09 acres and conforms to the minimum lot size of 5 acres as well as the minimum lot width requirement of 200 feet within the RR-5 zoning district.

- 2) *The exceptional topographic conditions or other extraordinary or exceptional situation or condition of the piece of property.*

The lot does not have any exceptional topographic conditions. However, due to numerous surveying errors described in detail in the letter of intent, the existing detached garage was constructed within the required setback from the rear property line. In 2016, the Planning and Community Development Department approved a site plan which depicted the structure to be located twenty-seven (27) feet from the rear property line. Approval of this request will legalize the location of the existing detached garage within the rear setback and allow the applicant to obtain a building permit for a proposed addition, which is not a part of the request.

However, Section 5.5.2.B.2.a, Variance to Physical Requirements, of the Code continues by stating the following:

*The Board of Adjustment may also grant variances from the strict application of any physical requirement of this Code based upon equitable consideration, finding that the burdens of strict compliance with the zoning requirement(s) significantly exceed the benefits of such compliance for the specific piece of property and;*

- *The variance provides only reasonably brief, temporary relief; or*

If approved, the variance would provide for permanent relief of the existing structure and would not meet this criterion.

- *The variance request includes an alternative plan, standards or conditions that substantially and satisfactorily mitigate the anticipated impacts or serve as a reasonably equivalent substitute for current zoning requirements; or*

An alternative plan, standard, or condition was not submitted by the applicant with this application.

- *Some other unique or equitable consideration compels that strict compliance not be required.*

Due to multiple surveying errors, the existing detached garage was constructed within the required setback from the rear property line. Approval of this request would legalize the location of the existing detached garage within the rear setback and allow the applicant to proceed with obtaining a permit for an addition that is not a part of this request. Should this request be denied, the detached garage would need to be demolished or the applicant would need to apply for a lot line adjustment with the adjacent neighbor.

### **C. BACKGROUND**

The 9.09-acre lot was created on July 26, 1960 prior to the adoption of modern subdivision regulations. The property was initially zoned A-4 (Farming) on September 20, 1965. Due to nomenclature changes of the Land Development Code, this district has been renamed as the RR-5 (Residential Rural) zoning district.

The existing detached garage was constructed in 2016 with site plan approval on October 14, 2016 (PCD File No. ADD-16-604). At the time of construction, the homeowners believed the existing detached garage was located 27 feet from the

rear property line. It was later discovered that the structure was actually constructed 1.34 feet from the rear property line. In 2021, the homeowners attempted to obtain approval for an addition to their existing home, but they were informed that the site plan could not be approved due to the detached garage being located within the rear setback.

Approval of this request will legalize the location of the existing detached garage within the required setback from the rear property line and allow the applicant to proceed with obtaining a permit for an addition that is not a part of this request.

#### **D. ALTERNATIVES EXPLORED**

There are two alternatives that would not require a dimensional variance request:

1. Remove the structure and construct a new detached garage that meets the setback requirements.
2. Complete a lot line adjustment to move the lot line between the subject property and the adjacent property to the north to correct the setback encroachment. This alternative would require the consent and participation of the adjacent property owner.

#### **E. APPLICABLE RESOLUTIONS**

Approval: Resolution 3

Disapproval: Resolution 4

#### **F. LOCATION**

North: RR-5 (Residential Rural)

Single-Family Dwelling

South: RR-5 (Residential Rural)

Single-Family Dwelling

East: RR-5 (Residential Rural)

Single-Family Dwelling

West: RR-5 (Residential Rural)

Single-Family Dwelling

#### **G. SERVICE**

##### **1. WATER**

Water is provided by an existing permitted well located on the property (Permit No. 74857).

##### **2. WASTEWATER**

Wastewater is provided by an existing permitted on-site wastewater treatment system (OWTS) (Permit No. ON0034594).

### **3. EMERGENCY SERVICES**

The parcel is located within the Black Forest Fire Protection District. The District was sent a referral and has no outstanding comments

## **H. ENGINEERING**

### **1. FLOODPLAIN**

FEMA Flood Insurance Rate Map Panel No. 08041C0315G (dated December 7, 2018) shows the property within the Zone X area, which is not within the 100-year floodplain.

### **2. DRAINAGE AND EROSION**

The parcel is located in the Kettle Creek (FOMO3000) drainage basin, which is a studied basin. No platting action is being requested; therefore, no drainage fees are due at this time.

Dimensional variance requests do not require submittal and review of a drainage report. There are no concerns associated with drainage impacts to drainage ways or easements that would require a drainage report.

### **3. TRANSPORTATION**

The 2016 El Paso County Major Transportation Corridors Plan Update does not depict any roadway improvement projects in the immediate vicinity of the development.

The parcel is accessed from Pinery Circle, which is a gravel rural local road maintained by the County. No public improvements are required for this application. There is a driveway permit on file for this property.

The dimensional variance request is not subject to the El Paso County Road Impact Fee Program (Resolution 19-471), as amended.

## **I. RECOMMENDED CONDITIONS OF APPROVAL**

Should the Board of Adjustment determine that the application is consistent with the criteria for approval of a dimensional variance for the detached garage, and that the applicant has met the review and approval criteria for granting variances from the applicable standards, staff recommends the following conditions and notation of approval:

**CONDITION**

1. The approval applies only to the plans as submitted. Any expansion or additions to the existing detached garage may require separate Board of Adjustment application(s) and approval(s) if the development requirements of the applicable zoning district cannot be met.

**NOTATION**

1. The PCD Director may require a survey, certified by a registered surveyor, licensed in the State of Colorado, depicting the improvement in relationship to the lot lines affected to demonstrate compliance with the approval of the administrative relief.

**J. PUBLIC COMMENT AND NOTICE**

The Planning and Community Development Department notified nine (9) adjoining property owners on July 20, 2021, for the Board of Adjustment meeting. Responses will be provided at the hearing.

**K. ATTACHMENTS**

- Letter of Intent
- Vicinity Map
- Site Plan
- Elevation Drawings

# Mulliken Weiner Berg & Jolivet P.C.

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June 29, 2021

El Paso County Board of Adjustment  
2880 International Circle  
Colorado Springs, CO 80910

Re: Application for Set Back Variance, Parcel ID 52054-00-007

Dear Members of the Board:

Please accept this letter as attached to and made a part of the Application for a Set Back Variance for El Paso County Assessor Parcel ID 52054-00-007, also known as 7575 Pinery Circle, Colorado Springs, CO 80908 (the "Property").

## **HISTORY OF PROJECT**

This project is in front of the Board on an application to approve a setback variance to allow for and legalize an existing detached structure (the barn) located on the Property. The Property is owned by Russell and Brianne Mallery (the "Mallerys"). The Mallerys purchased the Property in August of 2016. The Property is zoned RR-5 and consists of 9.09 acres that burned in the Black Forest Fire and a 4600 square foot home plus attached garage that was built in 2014 by Goetzmann Homes. Later in 2016, the Mallerys had the detached barn constructed. A copy of the 2016 approved site plan for the barn is attached to this letter as **Exhibit A**. When the barn was constructed on the north side of the Mallerys' house, it was believed to be 27 feet from the nearest lot line.

In 2021, when the Mallerys attempted to obtain approval for an addition to be constructed on the southside of the existing home (the "Addition"), they were initially told their project could not be approved because the barn had been constructed in County right of way. This contention turned out to be incorrect, and was cleared up through research by a local title company, confirmation by a licensed surveyor, final confirmation by Mr. Rick Van Dyke of the El Paso County Assessor's GIS department and then correction of the applicable GIS maps. Copies of the email chain outlining the title company research, conformation by the surveyor and final confirmation by Mr. Van Dyke are attached to this letter as **Exhibit B**.

# Mulliken Weiner Berg & Jolivet P.C.

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During this investigation, the Mallerys did order an improvement location certificate (“ILC”) of the Property, which was completed and certified by Colorado PLS Jim Lenz. A copy of the ILC is attached to this letter as **Exhibit C**. The ILC discloses the barn is within the required setback (1.34 feet inside the lot line) and the walkway adjacent to the barn actually encroaches onto the neighboring property. It appears that when the site plan for the 2016 barn construction project was done (which was based on the 2014 site plan prepared by Runge Architecture for the construction of the main residence), it was assumed the lot line was at the fence line. However, the ILC establishes the fence line is on the section line, which is actually 30 feet north of the lot line. Consequently, the main residence and the barn are actually 30 feet north of where they appear to be on the site plan in relation to the lot line.

Upon discovering the error, the Mallerys discussed the matter with the affected neighbor, Mr. William Livingston. Mr. Livingston has given his permission for the encroachment into the required setback and onto his lot. An easement agreement was entered into between the neighbors whereby Mr. Livingston granted an easement over the southerly 30 feet of his property for the encroachments, and the Mallerys and all future owners of the Property accept responsibility for maintaining the various encroaching improvements and also agree to indemnify the burdened property owner. The easement agreement as been recorded and is binding on future property owners. A copy of the easement agreement is attached to this letter as **Exhibit D**.

## **RELIEF REQUESTED**

The Mallerys are requesting approval of the application for a setback variance to allow for and legalize the location of the barn within the setback, as shown the current site plan, which is attached to this letter as **Exhibit E**. The setback variance is required for the existing barn, which is in the 25 feet rear lot line setback, to legalize the location for the barn within the set and in order for the final building permit and certificate of occupancy for the Addition to be issued. If this application is approved, the Mallerys will seek final approval of a building permit and certificate of occupancy for the Addition from the Pikes Peak Regional Building Department.

## **STATEMENTS IN SUPPORT**

The Mallery’s barn was constructed in honest reliance on a professionally prepared site plan. The original barn was fully permitted and approved by the appropriate County departments. It wasn’t until the Mallerys submitted the plans for the Addition that the setback problem was discovered. Once the problem was discovered, the Mallerys disclosed the problem to their affected neighbor, and he agreed to give them an easement across the southerly 30 feet of his property for the various encroachments and the setback. The easement agreement has been recorded in the real property records of El Paso County, runs with the land and is binding on all future owners of the affected properties.

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If granted the requested variance will permit only already permitted uses for the RR-5 zoning district. As set forth above, the circumstances leading up the barn being built in the setback were extraordinary and uncommon and resulted in a practical difficulty and hardship that were not self-created. The applicants relied on their professionals and previous County approvals. The unique circumstances caught both the applicants and County officials unaware. We believe that the burden of strict compliance with the Code outweigh any benefits of strict compliance. The Mallerys have obtained an easement for the encroachments from the affected neighbor. In addition, the Malley's have provided notice to, and obtained the consent of, each of their adjoining neighbors. The requested variance is narrow in application and represents the minimum relief necessary, it does not injure or interfere with the use of adjoining properties or rights of way and will not alter the character or the neighborhood nor impair the intent and purpose of the Code.

## CONCLUSION

Pursuant to Section 5.5.2 (B) (2) (a) of the El Paso County, Colorado Land Development Code, the Board of Adjustment is authorized to grant a variance from the strict application of any physical requirement of the Code "... based upon equitable consideration, finding that the burdens of strict compliance with the zoning requirement(s) significantly exceed the benefits of such compliance for the specific piece of property and ... [t]he variance request includes an alternative plan, standards or conditions that substantially and satisfactorily mitigate the anticipated impacts or serve as reasonably equivalent substitute for current zoning requirements...." In addition, granting the requested variance would not result in any of the actions prohibited under Section 5.5.2 (3).

In support of this application for a setback variance, the Mallerys put forward that the Board's approval of this application is equitable in light of their particular parcel and the easement agreement serves as a reasonably equivalent substitute for the current setback requirements. The requested variance would not be detrimental to anyone and these unique circumstances compel that strict application of the requirement of the Code not be required.

Sincerely,



Sara M. Frear

SMF:mjf

# El Paso County Parcel Information

PARCEL	NAME
5205400007	MALLERY RUSSELL T JR

File Name: BOA-21-004

Zone Map No. --

Date: July 19, 2021



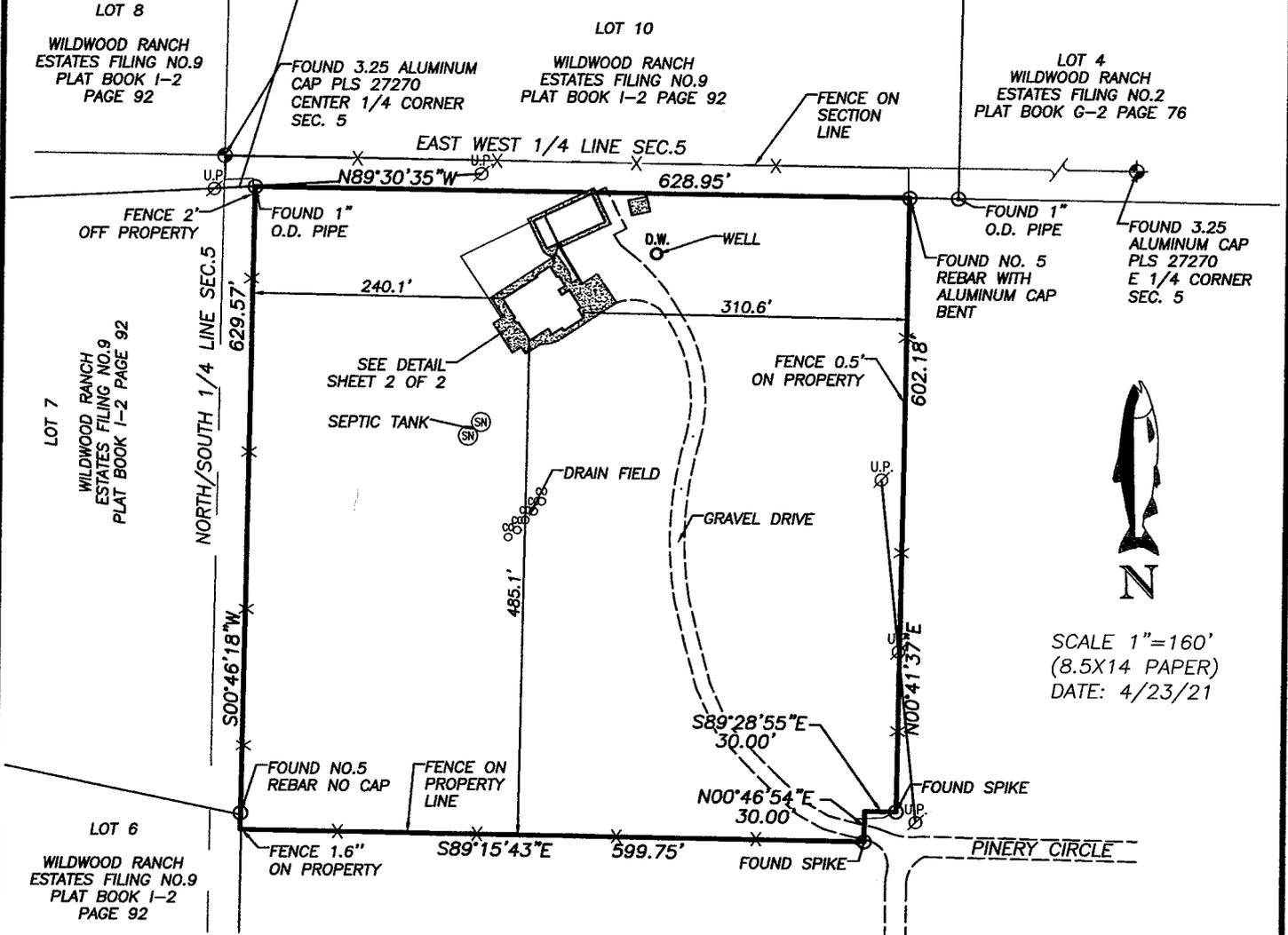
Please report any parcel discrepancies to:  
 El Paso County Assessor  
 1675 W. Garden of the Gods Rd.  
 Colorado Springs, CO 80907  
 10 (719) 520-6600



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# IMPROVEMENT LOCATION CERTIFICATE

SHEET 1 OF 2



SCALE 1"=160'  
(8.5X14 PAPER)  
DATE: 4/23/21

CERTIFIED TO: RUSSELL AND BRIANNE MALLERY AND LAND TITLE GUARANTY COMPANY, I HAVE MADE AN IMPROVEMENT LOCATION CERTIFICATE OF THE FOLLOWING DESCRIBED PROPERTY LOCATED IN THE COUNTY OF EL PASO, STATE OF COLORADO, AND LOCALLY KNOWN AS 7575 PINERY CIRCLE, COLORADO SPRINGS, COLORADO 80908.

**LEGAL DESCRIPTION:**

THE NORTHWEST QUARTER, OF THE NORTHWEST QUARTER, OF THE SOUTHEAST QUARTER, OF SECTION 5, IN TOWNSHIP 12 SOUTH, RANGE 65 WEST OF THE 6TH P.M., EXCEPT THE WEST 30 FEET AND THE NORTH 30 FEET THEREOF, ALSO EXCEPTING THE SOUTH 30 FEET OF THE EAST 30 FEET THEREOF.

I HEREBY CERTIFY THAT THIS IMPROVEMENT LOCATION CERTIFICATE WAS PREPARED FOR RUSSELL AND BRIANNE MALLERY, AND THE IMPROVEMENT LOCATION BEING BASED ON MY OWN SURVEY AT THE TIME I PREPARED THIS IMPROVEMENT LOCATION CERTIFICATE AND THAT IT IS NOT TO BE RELIED UPON FOR THE ESTABLISHMENT OF FENCE, BUILDING, OR OTHER FUTURE IMPROVEMENTS LINES.

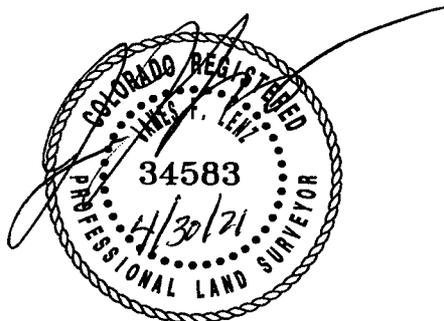
I FURTHER CERTIFY THAT THE IMPROVEMENTS ON THE ABOVE DESCRIBED PARCEL ON THIS DATE, APRIL 23, 2021, EXCEPT UTILITY CONNECTIONS, ARE ENTIRELY WITHIN THE BOUNDARIES OF THE PARCEL, EXCEPT AS SHOWN, THAT THERE ARE NO ENCROACHMENTS UPON THE DESCRIBED PREMISES BY IMPROVEMENTS ON ANY ADJOINING PREMISES, EXCEPT AS INDICATED, AND THAT THERE IS NO APPARENT EVIDENCE OR SIGN OF ANY EASEMENT CROSSING OR BURDENING ANY PART OF SAID PARCEL, EXCEPT AS SHOWN.

THIS SURVEY DOES NOT CONSTITUTE A TITLE SEARCH BY RIDGELINE LAND SURVEYING LLC., TO DETERMINE OWNERSHIP OR EASEMENTS OF RECORD.

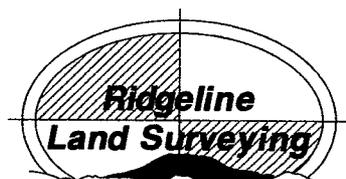
NOTE: CONCRETE PATH AROUND POLE BARN ENCROACHES ONTO LOT 10, WILDWOOD RANCH ESTATES FILING NO.9.

IMPROVEMENTS: SINGLE FAMILY RESIDENCE AND POLE BARN

BY: JAMES F. LENZ  
COLORADO, PLS NO. 34583  
FOR AND ON BEHALF OF  
RIDGELINE LAND SURVEYING LLC.



FOR:  
RUSSELL AND BRIANNE MALLERY



31 E. PLATTE AVE, SUITE 206  
COLORADO SPRINGS, CO 80903  
TEL: 719.238.2917

NOTICE: ACCORDING TO COLORADO LAW, YOU MUST COMMENCE ANY LEGAL ACTION BASED UPON ANY DEFECT IN THIS SURVEY WITHIN THREE YEARS AFTER YOU FIRST DISCOVER SUCH DEFECT. IN NO EVENT, MAY ANY ACTION BASED UPON ANY DEFECT IN THIS SURVEY BE COMMENCED MORE THAN TEN YEARS FROM THE DATE OF CERTIFICATION SHOWN HEREON.

