



Appeal Staff Report for Planning Commission Public Hearing on March Case File APP 2022-01

Date:	June 2, 2022
Case File:	APP 2023-01 Appeal of Director's Interpretation DI 2022-02
Appellant:	Randy Trout Jennifer L. Fowler and Keith L. Fowler
Situs Address:	2864 NE Lake Dr
Location:	Between NE Lake Dr to west and Devils Lake to east, approximately 285 feet north of NE 28 th St
Tax Map and Lot:	07-11-11-AB-00700-00
Comprehensive Plan Designation:	Medium-Density Residential District (R-7.5)
Zoning District:	Single-Unit Residential (R-1-7.5) Zone
Site Size:	5,662.80 square feet (per Lincoln County Assessor)
Proposal:	Request to appeal director's interpretation (DI 2022-02) of minimum setback requirement
Surrounding Land Uses and Zones:	North: Houses; R-1-7.5 South: Houses; R-1-7.5 East: Devils Lake West: NE Lake Dr, Hospital; PC
Authority:	Lincoln City Municipal Code (LCMC) 17.76.020 states that all land use applications and approvals shall be decided by using Type I, II, III, or IV procedures. The procedure types govern the decision-making process for that application. Table 17.76.020-1 lists an appeal of a Type II application as a Type III application with the Planning Commission as the review authority.
Procedure:	The application was received on February 9, 2023. The application was deemed complete on February 9, 2023. On February 14, 2023, pursuant to LCMC 17.76.050(E), the Planning and Community Development Department mailed a notice of public hearing to property owners within 500 feet of the subject property. The <i>News Guard</i> published the public hearing notice on February 21, 2023.
Applicable Substantive Criteria:	LCMC Chapter 17.16 Single-Unit Residential (R-1) Zone LCMC Section 17.76.050 Type III Procedure; 17.76.180 Appeals LCMC Section 17.77.030 Appeal

BACKGROUND

The subject property (site) is addressed as 2864 NE Lake Dr. The tax lot number is 07-11-11-AB-00700-00, and the assessed site size is 5,662.80 square feet. The site is developed with an existing single-story dwelling and a boat house, both of which were built in 1962. A boat dock was added in 1992, and a covered porch and detached garage were added in 2005. The site's east boundary is Devils Lake and the west boundary is NE Lake Dr. Houses are to the north and south of the site. Across NE Lake Dr to the west is the hospital. The site is in the R-1-7.5 zone, the properties to the north and south are zoned R-1-7.5, and the property to the west is zoned Professional Campus.

Lincoln City's GIS mapping shows the site does not contain bluff erosion hazards, trails, aesthetic resource, floodway, or natural resource overlays. The eastern portion of the site does contain AE flood hazard area.

The property owners desire to convert the existing single-story house to a two-story house, as well as adding onto the existing footprint. The conversion involves the new construction addition of a second story over the existing first story and an enlargement of the footprint by extending the southwest building corner to the south. A building permit application was submitted on July 22, 2022. The description of work on the application states: "Remodel: adding 2nd story, no change in footprint." On July 27, 2022, the applicant was notified that the permit application was on hold because additional items were needed to complete the application, consisting of payment of the plan review fee, a site plan, the Public Works Combined Checklist, and the Pre-Submittal Checklist. The plan review fee was paid, but the site plan and checklists were still outstanding as of October 20, 2022, when a reminder email was sent to submit the previously requested checklists and site plan. The checklists and site plan were received on November 4, 2022, and the building permit technician was able to deem the building permit application complete and move it forward for review.

Lincoln City Public Works review the application for compliance with Public Works Design Standards on November 14, 2022. The application was missing several items, and the applicant was notified accordingly on November 14, 2022. To date, the applicant has not submitted the additional items or revisions to address comments from Public Works.

The associate planner reviewed the application for compliance with LCMC Title 17 on November 17, 2022. The associate planner found several items out of compliance and notified the applicant accordingly on November 17, 2022. One of the non-compliant items involved setbacks. The comment from the associate planner states: "Setbacks need to be revised. The addition of the 2nd story turns the home from a 1 story to a two story home. All new additions must meet the setbacks for a 2 story structure which is 7.5 ft. no addition footprint may be added to the home, even on the 1st story, unless it meets the 7.5 ft setback."

A series of emails between the applicant and the associate planner regarding the minimum setback requirement resulted in the submittal of an application for a director's interpretation. The application for a director's interpretation was submitted on November 23, 2022, identified as DI 2022-02. The applicant stated the following in the application materials for DI 2022-02:

"The proposed addition to the existing residence consists of single story sections and a new second level. It has been carefully planned so that the single story portions of the addition fall within the 5' setbacks for 'one story structures' and the two story portions of the addition fall within the 7'-6" setbacks for structures 'more than one story.' This accomplishes a step-back building form consistent with the intent of the graduated set-back rules."

The director found the following in reaching the setback interpretation for DI 2022-02:

LCMC Section 17.08.010 provides the following definitions:

Setback means the minimum or maximum distance required between object and another point. Typically, a setback refers to the minimum or maximum distance from a building or structure to a specified property line.

Story means that portion of a building included between a floor and the ceiling above.

Structure means, except as provided by applicable building codes, any object constructed in or on the ground.

LCMC 17.16.070 states the following required minimums for setbacks:

<i>Front Setback</i>	<i>5' for one-story structures</i> <i>7 ½' for structures more than one story</i>
<i>Side Setback</i>	<i>5' for one-story structures</i> <i>7 ½' for structures more than one story</i>
<i>Street Side</i>	<i>5' for one-story structures</i> <i>7 ½' for structures more than one story</i>
<i>Rear Setback</i>	<i>5' for one-story structures</i> <i>7 ½' for structures more than one story</i>

The code does not provide a separate requirement for split-level structures, nor does it provide any relief for minimum setback requirements for split-level structures. The code does not provide a separate setback requirement for each level of a multi-level structure. Rather, the code provides a minimum setback requirement for one-story structures and a more restrictive minimum setback requirement for structures more than one story. The applicant notes that the project “accomplishes a set-back building form consistent with the intent of graduated set-back rules.” However, LCMC 17.16.070 does not provide any provisions for step-back building forms or for graduated setbacks. Rather, LCMC 17.16.070 clearly lists a minimum 5-foot setback requirement for one-story structures and a 7 ½’-foot setback requirement for structures more than one story.

The applicant states: “I cannot find anything in the zoning code that supports defining single story portions of an addition as two story structures simply because the building is two story.” LCMC 17.16.070 clearly provides a minimum setback requirement for one-story structures and a separate minimum setback requirement for structures more than one story. Either the structure is a one-story structure or it is a structure with more than one story, with the minimum setback requirements applying accordingly. The applicant’s building permit application specifically notes in the description of work that the project is adding a second story. The addition of a second story to a single-story structure makes the structure a structure with more than one story.

As stated by the applicant, the existing single-story building footprint does not conform to the minimum 5-foot setback for a single-story structure. LCMC 17.64.020(A) notes:

Alteration of a Nonconforming Structure. A nonconforming building or structure may be enlarged or altered to the extent that such alteration or enlargement conforms to current regulations.

LCMC 17.16.070 requires a minimum setback of 7 ½ feet for structures more than one story. The structure is currently a single story. Accordingly, any enlargement or alteration is allowed, but only to the extent that such alteration or enlargement conforms to current regulations. As stated in LCMC 17.16.070, the current regulations require a minimum setback of 7 ½ feet for a two-story structure. The addition of the second story

converts the entire structure to a two-story structure. All portions of the addition, enlargement, or alteration must conform to the current regulation of a 7 ½-foot minimum setback for a two-story structure. LCMC 17.64.020 does not allow for the enlargement or alteration to the existing structure as proposed because it will not be able to conform to current regulations; namely, the proposed expansion of the southwest corner does not meet the 7 ½-foot setback requirement for a two-story structure. The applicant proposes a 5-foot setback for the expansion of the southwest corner. However, the applicant is converting the structure to a two-story structure. Accordingly, all portions of the addition, enlargement, or alteration must conform to the requirements for a two-story structure. If the applicant was not converting the structure to a two-story structure and keeping it as a single-story structure with an expansion of the southwest corner, then the minimum 5-foot setback requirement for a single-story structure would be applicable.

The applicant references a tight and small site and a “proposed design” that “is not unreasonable.” The size of the site is not applicable to the interpretation of the setback requirement in LCMC 17.16.070. Whether the proposed design is reasonable or not is not applicable to the interpretation of the setback requirement in LCMC 17.16.070.

The applicant cites the “inferred intent of the graduated setbacks” where there are no inferred intents. The requirement is very clear – a 5-foot setback for single-story structures and a 7 ½-foot setback for structures with more than one story (see LCMC 17.16.070 below).

17.16.070 Lot requirements.

The map designations R-1-5, R-1-7.5 and R-1-10 create separate single-unit residential zoning classifications as though separately listed in LCMC [17.12.010](#). Lot requirements for the zoning classifications designated on the zoning map shall be as follows:

REQUIRED MINIMUMS								
Zone	Lot Area	Lot Width	Lot Depth	Front Setback ⁽³⁾	Side Setback	Street Side Setback ⁽³⁾	Rear Setback	Maximum Building Coverage ⁽⁵⁾
R-1-5	5,000 sq. ft.	50' detached; 35' attached	70'	5 ⁽¹⁾ 7-1/2 ⁽²⁾	5 ⁽¹⁾ 7-1/2 ⁽²⁾ or 0' for common wall of attached dwellings	5 ⁽¹⁾ 7-1/2 ⁽²⁾	5 ⁽¹⁾ 7-1/2 ⁽²⁾	35% ⁽⁴⁾
R-1-7.5	7,500 sq. ft.	70' detached; 35' attached	80'	same as above				35% ⁽⁴⁾
R-1-10	10,000 sq. ft.	80'	80'	same as above				35% ⁽⁴⁾

- (1) For one-story structures.
- (2) For structures more than one story.
- (3) The front and street side setbacks shall be increased to a minimum of 20 feet in front of a garage/carport and/or driveway entrance to a garage/carport. The increase in setback shall not apply to portions of the dwelling that are below or to the side of the garage/carport or driveway entrance. The increase in setback shall not apply to any portion of the dwelling above the garage/carport that is cantilevered (i.e., supported only by the wall of the structure from which it projects), provided the lowest point of the cantilever is a minimum of seven feet above grade. On corner lots, the clear-vision area requirements of LCMC [17.52.060](#) shall apply.
- (4) For existing lots between 3,000 sq. ft. and 4,000 sq. ft., maximum building coverage shall be 40 percent. For existing lots less than 3,000 sq. ft., maximum building coverage shall be 50 percent.

(5) See definition of “building coverage” in Chapter [17.08](#) LCMC.

COMMENTS

No comments were received for APP 2023-01.

ANALYSIS

Chapter 17.76 Procedures

17.76.050 Type III procedure

- A. *General Description. Type III procedures apply to quasi-judicial permits and applications. Decisions on quasi-judicial permits and applications are made by either the planning commission or city council, and require substantial exercise of discretion and judgment in applying approval criteria. Type III procedures require public notice and one or more public hearings.*
- B. *When Applicable. Table 17.76.020-1 identifies Type III applications. Applications not listed in Table 17.76.020-1 may be identified as Type III by the director based on the general description in this section.*
- C. *Pre-Application Conference. A pre-application conference is not required prior to application submittal of a Type III application, but is strongly encouraged. Guidelines for pre-application conferences are set forth in LCMC 17.76.090.*

Finding: A pre-application conference was not held, nor was one required.

- D. *Application Requirements. Type III applications shall:*
 - 1. *Be submitted on application forms provided by the department and shall include all information, exhibits, plans, reports, and signatures requested on the application forms.*
 - 2. *Be accompanied by the required fee as adopted by city council resolution.*
 - 3. *Be subject to the completeness review procedure set forth in LCMC 17.76.110(D) and (E).*

Finding: The required application forms and materials were submitted, along with the required fee. The application was deemed complete in accordance with LCMC 17.76.110(D) and (E).

- E. *Notice of Public Hearing.*
 - 1. *After a Type III application has been accepted as completed under LCMC 17.76.110(E), the department shall mail a written public notice to the following:*
 - a. *The applicant and applicant’s representative;*
 - b. *Owner of record of the subject property;*
 - c. *Property owners of record within 250 feet of the perimeter property line of the property or properties subject to the application, using the most recently provided property tax assessment roll of the Lincoln County assessor’s office as provided to the city to determine property owners of record; and*
 - d. *Any neighborhood or community organization or association recognized by the governing body and whose boundaries include the site.*
 - e. *At the discretion of the application, the department also shall provide notice to the Oregon Department of Land Conservation and Development.*

Finding: The Planning and Community Development Department mailed the public notice of a public hearing to the parties noted in LCMC 17.76.050(E)(1)(a) through (e).

- 2. *The notice of public hearing shall include the following:*
 - a. *A brief description of the request;*

- b. *A list of the applicable criteria from the ordinance and the comprehensive plan that apply to the application at issue;*
- c. *The street address or other easily understood geographical reference to the subject property;*
- d. *The date, time, and location of the hearing;*
- e. *A statement that failure of an issue to be raised in a hearing, in person or by letter, or failure to provide statements or evidence sufficient to afford the decision maker an opportunity to respond to the issue precludes appeal to the Board based on that issue;*
- f. *The name of a department staff member to contact and the telephone number where additional information may be obtained;*
- g. *A statement that a copy of the application, all documents and evidence submitted by or on behalf of the applicant, and applicable criteria are available for inspection at no cost and will be provided at reasonable cost;*
- h. *A statement that a copy of the staff report will be available for inspection at no cost at least seven days prior to the hearing and will be provided at reasonable cost; and*
- i. *A general explanation of the requirements for submission of testimony and the procedure for conduct of hearings.*

Finding: The public notice of hearing contained all the information required in LCMC 17.76.050(E)(2)(a) through (i).

F. Public notices for Type III applications shall be mailed a minimum of 20 days prior to the first evidentiary public hearing. The failure of a property owner to receive notice does not invalidate the land use action if the notice as sent. Notice of the public hearing for Type III applications shall also be published in a newspaper of general circulation in the city, at least 10 days but not more than 21 days before the first scheduled public hearing on the proposal.

Finding: The public hearing is scheduled for March 7, 2023. The public notice was mailed on February 14, 2023. The public notice was published in *The News Guard* on February 21, 2023.

17.76.180 Appeals

A. In General. Appeals of director decisions are heard by the planning commission. Appeals of planning commission decisions are heard by city council. There is no local appeal of city council decisions. The city council decision is the final local decision.

Finding: DI 2022-02 is a director's interpretation, and the decision for the case was made by the director. According, any appeals of the decision for DI 2022-02 shall be heard by the Planning Commission.

B. Notice of Appeal. Where the appeal authority is the city, notices of appeal shall be filed with the department within 12 days of the mailing date of the written notice of the decision. Appeals must be received in the department no later than 5:00 p.m. of the twelfth day of the mailing date of the written notice of the decision. At a minimum, the notice of appeal shall include the following items:

Finding: The notice of decision was mailed on January 30, 2023. The notice of appeal was filed with the department on February 9, 2023, which is within the 12-day appeal period.

- 1. Identification of the decision being appealed, including the case file number, the review authority which made the decision, and the date of the decision;*

Finding: The case file number of the decision being appealed is DI 2022-02. The review authority who made the decision was the director. The date of the decision was January 25, 2023. The notice of decision was mailed on January 30, 2023.

2. *Documentation that the appellant was a party to the initial proceedings;*

Finding: The appellant was the applicant for DI 2022-02.

3. *A detailed statement on the basis of the appeal, including which approval criteria, development standards, or conditions of approval were allegedly improperly evaluated or applied to the decision; and*

Finding: The appeal application includes a written narrative detailing the reasons the appellant feels the director's interpretation of the minimum setback for a structure with more than one story is incorrect.

4. *Payment of the appropriate fee, as adopted by city council resolution.*

Finding: The appropriate fee was paid with submittal of the appeal application.

RECOMMENDATION

Staff recommends that the Planning Commission hold a public hearing on the appeal request, take public testimony, close the public hearing, deliberate, and determine if the director's interpretation of the minimum setback requirement of 7 ½ feet for a structure with more than one story is correct. Staff recommends that the Planning Commission deny the appeal and uphold the director's interpretation as being correct since the code states the minimum setback requirement for a structure with more than one story is 7 ½ feet.