



TO: Town of Foxfield, Board of Adjustment
 FROM: Travis Reynolds, Town Planner, Town of Foxfield / Planning Manager, SAFEbuilt Studio
 DATE: May 6th, 2020
 SUBJECT: Staff Report – Variance Application: 6972 S Yampa Ct

CASE #6972-21

BOA Date:	May 6, 2021	Planner:	Travis Reynolds	Phone:	303-912-7153
Location:	6972 S. Yampa Ct Foxfield, CO 80016				
Applicant:	Kirby Smith, Kirby Smith & Associates, Inc.	Owner:	Behr Family Trust c/o Paul C. Behr, Trustee		
Address:	6201 S Hudson Court Centennial, CO 80121	Address:	6993 S. Andres Circle Centennial, CO 80016-2111		

Case Summary

Request:	Request for a variance to allow for the construction of an accessory structure on a vacant lot prior to the establishment of the principal permitted use.
Project Description:	Town of Foxfield Municipal Code prohibits the establishment of accessory structures and uses prior to the establishment of the principal permitted use. The applicant is requesting a variance to allow the construction of an accessory structure prior to the construction of principal residential structure. The applicant’s own the adjacent lot (in Centennial), where their primary residence is located, and wish to build the accessory structure in question for personal use.
Issues/Concerns:	<ul style="list-style-type: none"> Municipal boundaries. Unique circumstance with primary residence located in Centennial, CO and the property in question located in Foxfield, CO Future use(s) and sale of the property Compatibility with Town of Foxfield Master Plan and intent of the RR district.
Staff Recommendation:	Denial of the Request
Current Zone District:	RR (Large Lot Rural Residential)
Comp Plan Designation:	Residential (Rural)

Attachments for Review

- Attachment A: Applicant’s Variance Request Narrative and Supporting Materials

Background Information

Site Information

Site Size:	2.24 acres (apx 97,574 square feet)
Current Conditions:	Vacant
Existing Right-of-Way:	S. Yampa Court (to the west)
Existing Buildings:	Site is vacant; Applicant’s property is adjacent to the east (across municipal boundary) and there are neighboring residential properties to the north, south, and west across S. Yampa Ct.
Buildings to Remain?	<input type="checkbox"/> Yes <input type="checkbox"/> No <input checked="" type="checkbox"/> NA
Site in Floodplain?	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No

Surrounding Properties

<u>Existing Land Use</u>		<u>Occupant</u>	<u>Zoning</u>
North	Residential	Residence – 18371 E Davies Ave	RR
South	Residential	Residence – 7034 S Yampa Ct	RR
East	Residential	Residence – 6993 S Andes Cir (Centennial) (owned by same owner)	Centennial
West	Institutional	Residence – 6971 S Yampa Ct	RR

Site Map



Applicant's Request

The applicant requests the approval of a variance to allow the construction of an accessory structure prior to the establishment of the principal residential structure and use on the site. The proposed accessory structure would be approximately 40ft x 50ft (2,000sf) in size and built in a style and architectural quality comparable to accessory structures on neighboring properties. The proposed structure would be used by the property owners, whose primary residence is located adjacent to the east, in the City of Centennial, at 6993 S. Andes Circle, across the municipal boundary. The proposed accessory structure would be proposed on the lot in a manner and location that would allow the owner's access, while maintaining the vast majority of the lot as open/vacant land. This siting preserves the owner's western views and would accommodate the future construction of a single-family residence on the lot. The proposed structure would be served by electricity, but not by water or septic systems. The structure would be accessed from both S. Yampa Court and the owner's primary residence to the east.

Planning & Zoning Staff Analysis

Section 16-2-50(d)(4) states "Accessory structures and uses are not permitted unless and until the principal permitted use has been established on the property." This is the standard from which the applicants seek relief. The current Large Lot Residential (RR) zone district allows a detached accessory structure of the size and scope the applicant is proposing. However, as stated above, the code requires that such structure be constructed only after the principal residential use/structure is established.

The Town has architectural and development standards that control the design, placement, and aesthetics of accessory structure which would render a proposed accessory structure to have limited impacts on neighboring properties. The Town's controls would require an accessory structure to be similar in size and design to other accessory structures nearby. However, the instances of accessory structures existing prior to the principal structure on the same parcel are nearly non-existent in the surrounding neighborhood and throughout the Town. The primary character of the adjacent area consists of solely residential properties (principal single-family residential structures with detached accessory structures).

This variance would not result in a change in zoning, and thus the proposal generally aligns with the Town of Foxfield Master Plan. Multiple provisions in the Master Plan encourage development that "enhance[s] and protect[s] the existing low density, single family, and rural character of the community" or that is "compatible with a rural character, in terms of land use, scale or other characteristics." However, other provisions in the Master Plan encourage "appropriate and compatible development of currently undeveloped land." In light of future possible use(s) or sale of the property, developing such a large vacant tract with a lone detached accessory structure is not the highest and best development of the currently vacant property.

As outlined in further detail in Table 1. below, the main concerns with this application are related to the variance approval criteria outlined in Chapter 16, Article 5, Section 70 – Variances and appeals.

If the variance is granted, the owner must still obtain the appropriate permit(s) from the Town of Foxfield for any future proposed site development. All future site development shall conform with all other applicable provisions and development standards of the Town of Foxfield Municipal Code.

Variance Criteria Analysis

The property in question is subject to variance approval criteria found in Section 16-5-70 of the Town of Foxfield Municipal Code. The owner of the property provided answers to the criteria from Sec. 16-5-70 in their Variance Request Letter (Attachment A) and in a supplemental letter from their attorney (Attachment B). Below is a staff analysis of each point:

Table 1.

Criteria Met?	Approval Criteria	Rationale
<input type="checkbox"/>	<p>Section 16-5-70-(a)-(2)-(a) The applicant would suffer hardship as a result of the application of this Chapter, which hardship is not generally applicable to other lands or structures in the same zone district because of the unusual configuration of the applicant’s property boundaries, because of unique circumstances related to the location of existing structures thereon or because of the existence of exceptional topographic conditions thereon.</p>	<p>There is no hardship for the subject property that is not applicable to all other properties in the RR zone district. All similarly situated property owners are prohibited from building accessory structures until after the principal use has been established. The Town’s standard of the development sequencing of a principal structure, prior to an accessory structure, is applicable to all other lands in the RR district. In this instance, the applicant owns this vacant parcel in the Town of Foxfield. The applicant also owns their principal residence on the adjacent parcel in a neighboring jurisdiction (Centennial). Although this is a unique jurisdictional configuration, it does not constitute a hardship</p>
<input type="checkbox"/>	<p>Section 16-5-70-(a)-(2)-(b) There are no design alternatives or alternative locations for structures that would obviate the need for the requested variance or would reduce the amount of the variance required.</p>	<p>The request is to build an accessory structure that is not permitted without a principal residential structure. The only design alternatives allowed by the adopted code are to build a principal residence first, or to not build the accessory structure at all.</p>
<input type="checkbox"/>	<p>Section 16-5-70-(a)-(2)-(c) The enforcement of the provisions of this Chapter deprives the applicant of rights enjoyed by a majority of the other properties in the same zone district under the terms of this Chapter.</p>	<p>The applicant identified six properties in the Town of Foxfield where the owner of the principal residential property also owns an adjacent vacant property. One of these six vacant properties has an existing accessory structure on it, without a principal residence. This handful of samples and the lone example of a vacant property with an existing, legal, non-conforming accessory</p>

Criteria Met?	Approval Criteria	Rationale
		structure does not constitute the majority of the other properties in the same zone district under terms of the Zoning chapter. Standard enforcement of the zoning code does not allow an accessory structure to precede development of a principal structure.
<input type="checkbox"/>	Section 16-5-70-(a)-(2)-(d) The need for the variance does not result from the intentional, reckless or negligent actions of the applicant or his agent, a violation of any provision of this Code or a previously granted variance.	The requested relief does not, seemingly, result from intentional, reckless, or negligent actions of the applicant. As this is currently vacant land, no need is created by a previous violation of the Town’s Code and there is no evidence of a previously granted variance.
<input type="checkbox"/>	Section 16-5-70-(a)-(2)-(e) Reasonable protections are afforded adjacent properties.	If the variance is granted, adjacent properties are subject to a minimally improved lot (accessory structure) with no guarantees of future “compatible development” as outlined in the Comprehensive Plan.
<input type="checkbox"/>	Section 16-5-70-(a)-(2)-(f) The requested variance will not cause an undesirable change in the character of the neighborhood or have an adverse effect on the physical or environmental conditions of the surrounding property.	The current character of the neighborhood is large lot single family development with accessory structures residing on the same parcel of property. The establishment of an accessory structure prior to a principal residential structure will set a precedent for similar sequencing of property development. In accordance with 16-2-50 (d)(5) – <i>Accessory structures and uses are not permitted unless and until the principal permitted use has been established on the property.</i> The language of the code contemplates both the pairing with a principal structure on the same parcel and the appropriate sequencing of a principal structure prior to an accessory structure.
<input type="checkbox"/>	Section 16-5-70-(a)-(2)-(g) The variance is the minimum variance that will make possible the reasonable use of the land or structure.	The reasonable use of the land is outlined by the Comprehensive Plan and the Municipal Code through Chapter 16 – Zoning. The underlying zone district (RR) highlights the development of low-density, single family residential uses on large lots. The code also anticipates the development of accessory structures in conjunction with principal structures. This is the predominant development pattern in the neighborhood and town.

Criteria Met?	Approval Criteria	Rationale
<input type="checkbox"/>	<p>Section 16-5-70-(a)-(2)-(h) The granting of the variance will:</p> <ol style="list-style-type: none"> 1. Observe the spirit of this Chapter; 2. Secure the public safety and welfare; 3. Ensure that substantial justice is done; and 4. Observe common sense. 	<ol style="list-style-type: none"> 1. For reasons stated above, the granting of the variance does not observe the spirit of the RR district. 2. This variance will not, seemingly, adversely affect public safety or welfare. However, the allowed variance to construct an accessory structure and potentially postpone development anticipated by the Comprehensive Plan and Code may have an underlying impact to the neighborhood and surrounding properties. 3. This variance request is not providing remedy for an unjust condition. This is a simple request for a direct variation from the code. 4. The specificity of 16-2-50 (d)(5) prohibiting the proposed sequence of building development highlights that town decision makers, vested with land use authority, have considered this unique scenario in adopting the language of the code. Approving this variance may set a poor precedent for future property owners to attempt to similarly exempt themselves from the principal structure first, accessory structure second sequence. Further, future transactions of the property do not guarantee that both properties (the applicant's property in Centennial and the subject property for request of the variance) will remain under common ownership.

Planning & Zoning Staff Recommendation

Based upon the analysis above, the Planning & Zoning Staff believe the application does not meet the criteria for a variance, as set forth in Chapter 16-5-70 (a-h) of the Town of Foxfield Municipal Code and recommends that the Board of Adjustment deny the request of the applicants, at 6972 S. Yampa Court, to construct an accessory structure on the parcel prior to the establishment of the principal permitted use. The recommendation is provided in the context of the analysis of the approval criteria offered above.



ATTACHMENT A

Kirby Smith & Associates, Inc.

May 11, 2020 Updated 01/25/21

Town of Foxfield Town Clerk
c/o Randi Gallivan
P.O. Box 461450
Foxfield, CO 80046

RE: Paul & Suzanne Behr Property- 6972 S. Yampa Court, Foxfield, CO 80016 – A.K.A. Lot 3, Block 1, Sierra Vista Estates Sub. Filing No. 4 - Variance Request.

Dear Randi:

Our company, Kirby Smith & Associates, Inc., on behalf of the property owner, Paul & Suzanne Behr, are requesting a waiver of Chapter 16 Zoning Code, Sec. 16-2-50 Large Lot Rural District (RR), (d) Development Standards Specific to the RR Zone District, item (5). Which states: “*Accessory structures and uses are not permitted unless and until the principal permitted use has been established on the property.*” This request is for a variance to allow the property owners to construct an accessory structure on their lot prior to the establishment of the principal permitted use (i.e. prior to the construction of a single family home on this lot). The proposed accessory structure would be proposed to be approximately 40’ x 50’ (2000 SF) in size; and built in a style and architectural quality comparable to the accessory structures on nearby adjacent properties within Foxfield. This proposed accessory structure would be sited on the lot in a manner and location that would allow the owner access; while maintaining the vast majority of the lot as passive open space (to preserve the view from the owner’s primary residence, located to the west of the lot described above) for the foreseeable future; and preserving the bulk of the property to accommodate the possible construction of a single family home on this lot at some point in the future. The proposed accessory structure would be served by electricity, but not by water or septic systems; and accessed from both S. Yampa Court and the owner’s primary residence which lies on the lot directly to the east of the subject lot. Exhibit A below contains several photos of the Behr’s lot, with their home in the background. Please see the attached photos of nearby comparable accessory structures within Foxfield (Exhibit B below); the attached conceptual sketch plan for this lot; and typical Morton Buildings (Exhibit C below) that represent the style and architectural quality of the structure that the owner intends to build.

In support of this variance request the Applicant and Owner offer the following responses to the findings required by the Board of Adjustment in order to authorize such a variance:

a. The applicant would suffer hardship as a result of the application of this Chapter, which hardship is not generally applicable to other lands or structures in the same zone district because of the unusual configuration of the applicant's property boundaries, because of unique circumstances related to the location of existing structures thereon or because of the existence of exceptional topographic conditions thereon. – The Behr Family own the lot immediately to the east and adjacent to the subject lot, where their primary residence is located. They purchased the subject lot to function as a visual open space buffer, in order to preserve their home’s mountain view. Due to the 16-2-50 (d) (5) provision, the owner is unable to build an accessory structure on this lot because of the unusual configuration of the property boundary which separates the owner’s primary residence from the remainder of their property ownership. The result of the application of the provision listed above would mean that the owner would need to first establish a single family detached dwelling on this lot before an accessory structure could be built. For a retired couple with a home overlooking this property, the construction of another home (at the cost of between \$700,000 and \$720,000) would constitute a significant hardship.

b. There are no design alternatives or alternative locations for structures that would obviate the need for the requested variance or would reduce the amount of the variance required. – Design alternatives or alternative locations within this lot are not the concern. Based on the 16-2-50 (d) (5) provision, the only alternative would be for the owner to first establish a single family detached dwelling on this lot property (which is a considerable hardship).

c. The enforcement of the provisions of this Chapter deprives the applicant of rights enjoyed by a majority of the other properties in the same zone district under the terms of this Chapter. – The enforcement of the 16-2-50 (d) (5) provision deprives the owner from building an accessory structure on their property, in relative proximity to their home. There are currently 12 vacant RR lots within Foxfield; 6 of these are examples of vacant RR residential lots that are owned by the adjacent home owner (three of these have existing accessory buildings near their homes); and there is one vacant RR lot owned by the adjacent home owner that has an existing accessory structure constructed upon it. Therefore, this situation indicates that such a variation from the strict application of the 16-2-50 (d) (5) provision exists in the Town without any negative impacts on the adjacent properties or the community as a whole. (See the attached Vicinity Map & Foxfield Vacant RR Lots). Thus leaving only the Behr property and one other adjacently owned vacant lot without existing accessory structures.



Kirby Smith & Associates, Inc.

d. The need for the variance does not result from the intentional, reckless or negligent actions of the applicant or his agent, a violation of any provision of this Code or a previously granted variance. – No such actions have been taken by the owner. Only the lawful purchase of this lot in 2008.

e. Reasonable protections are afforded adjacent properties. – Other than the requested variance, all other setbacks and lot development standards per the Town's zoning, subdivision, and building codes and requirements will be met by the future construction of the proposed accessory structure. In addition, the lot will remain as mainly passive open space for the foreseeable future; while preserving the ability for a single family detached dwelling unit to be built at some point in the future.

f. The requested variance will not cause an undesirable change in the character of the neighborhood or have an adverse effect on the physical or environmental conditions of the surrounding property. – The neighborhood character will remain the same as a semi-rural residential neighborhood; with single family detached homes and accessory structures interspersed with areas of open land. The addition of the proposed accessory structure on this lot will be of a similar character as the other accessory structures seen along S. Yampa Court, and along other streets within the Town of Foxfield. Therefore there will be no adverse effects on the surrounding properties of the community as a whole. The owners have always maintained their properties in a neat and clean condition (with regular mowing, and no trash, or storage clutter. See Exhibit A photos of the subject property).

g. The variance is the minimum variance that will make possible the reasonable use of the land or structure. – Yes. This is the minimum variance that will allow the owner to build the proposed structure without the hardship and added expense of building another single family home.

h. The granting of the variance will:

1. *Observe the spirit of this Chapter;* - Yes. It will allow the owners to build an accessory structure similar to their neighbors, while preserving the ability for another single family detached dwelling unit to be built in the Foxfield community at some point in the future.

2. *Secure the public safety and welfare;* - Yes. The granting of this variance will not adversely affect public safety or welfare.

3. *Ensure that substantial justice is done; and* – Yes. The granting of this variance will allow the owners to develop a desired structure for their personal use, which at some point in time may become an accessory building for a new owner of the lot, who will likely build a new home on the lot.

4. *Observe common sense.* – Yes. It will allow the construction of a structure that is entirely within the character of the neighborhood; while maintaining the vast majority of the lot as passive, visual open space for the benefit of the surrounding community; and when eventually sold by the owners or their heirs will allow the construction of a new single family detached home within the Town. However, with or without the approval of this requested variance, the timing for the future sale of this lot, and the ultimate construction of a new home will not change.

Owners: Paul & Suzanne Behr
6993 S. Andes Court
Centennial, CO, 80016-2111
303-807-1108

Applicant/Representative: Kirby Smith & Associates, Inc.,
Mr. Kirby Smith -303-694-9484
6201 So. Hudson Ct.
Centennial, CO 80121
E-mail: ksakirby@aol.com

Following the applicant's and owner's pre-application conference call with the Town staff (11/06/20), we respectfully submit this proposed variance narrative and supporting exhibits, and request the Town staff's review and comments in preparation for a formal submittal for Board of Adjustment approval of the above requested variance.

Sincerely,

Kirby J. Smith
President



Kirby Smith & Associates, Inc.

EXHIBIT A

Paul & Suzanne Behr Foxfield Lot- 6972 S. Yampa Court





Kirby Smith & Associates, Inc.

EXHIBIT B

Nearby Comparable Accessory Structures Within Foxfield (7034 S. Yampa Court, immediately south of the Behr Property)





Kirby Smith & Associates, Inc.

EXHIBIT C

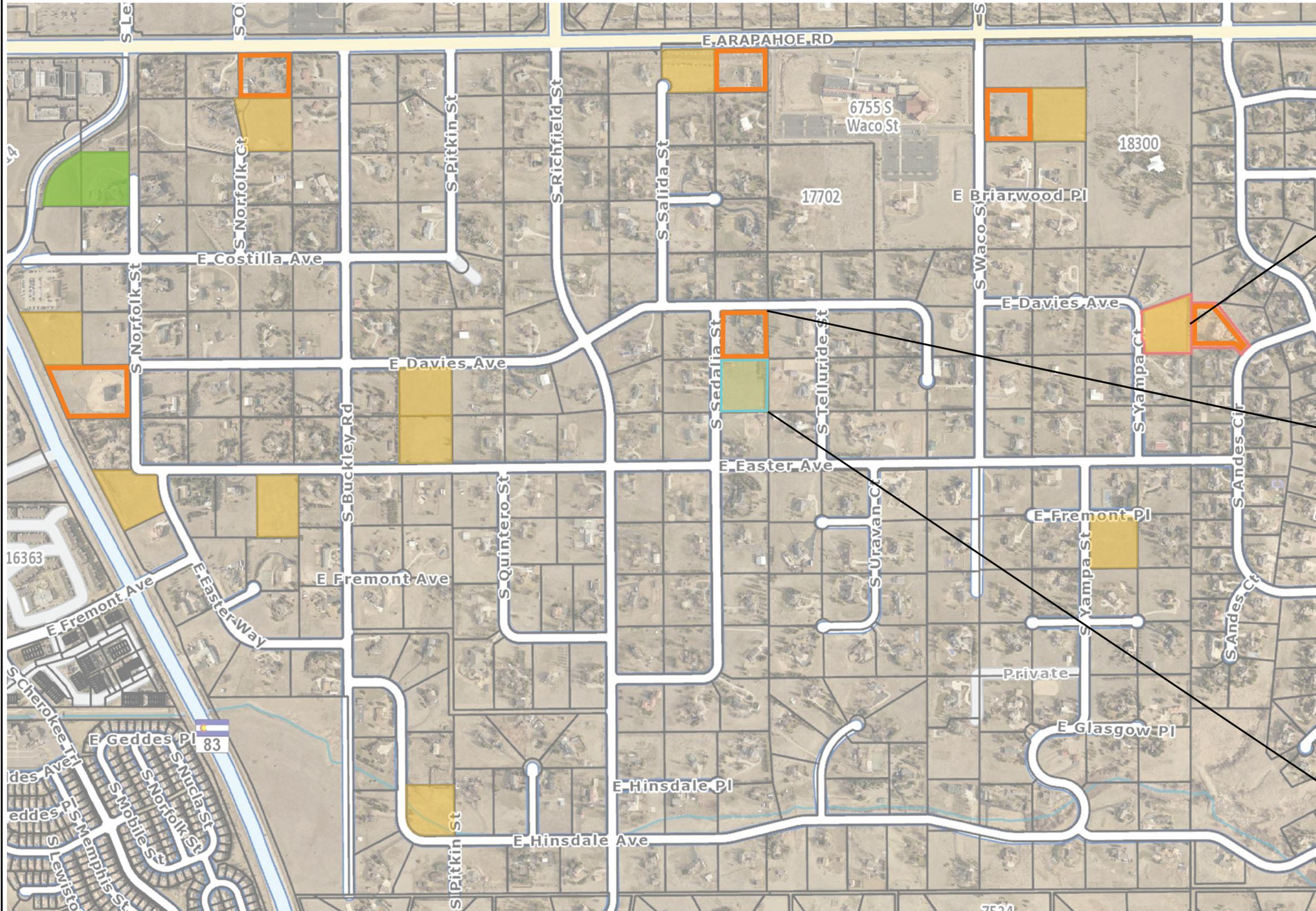
Typical Morton Building Examples



PAUL & SUZANNE BEHR PROPERTY

Variance Request - Vicinity Map & Foxfield Vacant RR Lots

Lot 3, Block, Sierra Vista Estates Subdivision, Filing No. 4
Town Of Foxfield, Colorado
Sheet 1 Of 2



Behr's Property

Enlargement Of:
Tom & Margaret Garthright RR Lots

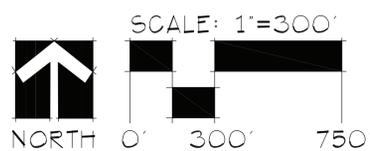


TOWN OF FOXFIELD VACANT RR LOTS = 12 :

TOWN OF FOXFIELD VACANT RR LOTS = 2 Owned by Foxfield:

TOWN OF FOXFIELD VACANT RR LOTS OWNED BY ADJACENT HOME OWNER = 6:

TOWN OF FOXFIELD VACANT RR LOTS WITH EXISTING ACCESSORY STRUCTURES = 1:



Prepared By:
Planner:



Kirby Smith & Associates, Inc.
Land Planning • Site Design • Landscape Architecture
6201 So. Hudson Court, Centennial, CO 80121
(303) 694-9484 FAX (303) 694-9272

Prepared For:
Paul & Suzanne Behr
c/o Paul C. Behr
6993 S. Andes Court
Centennial, CO 80016
(303) 807-1108

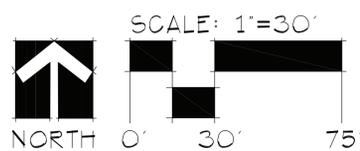
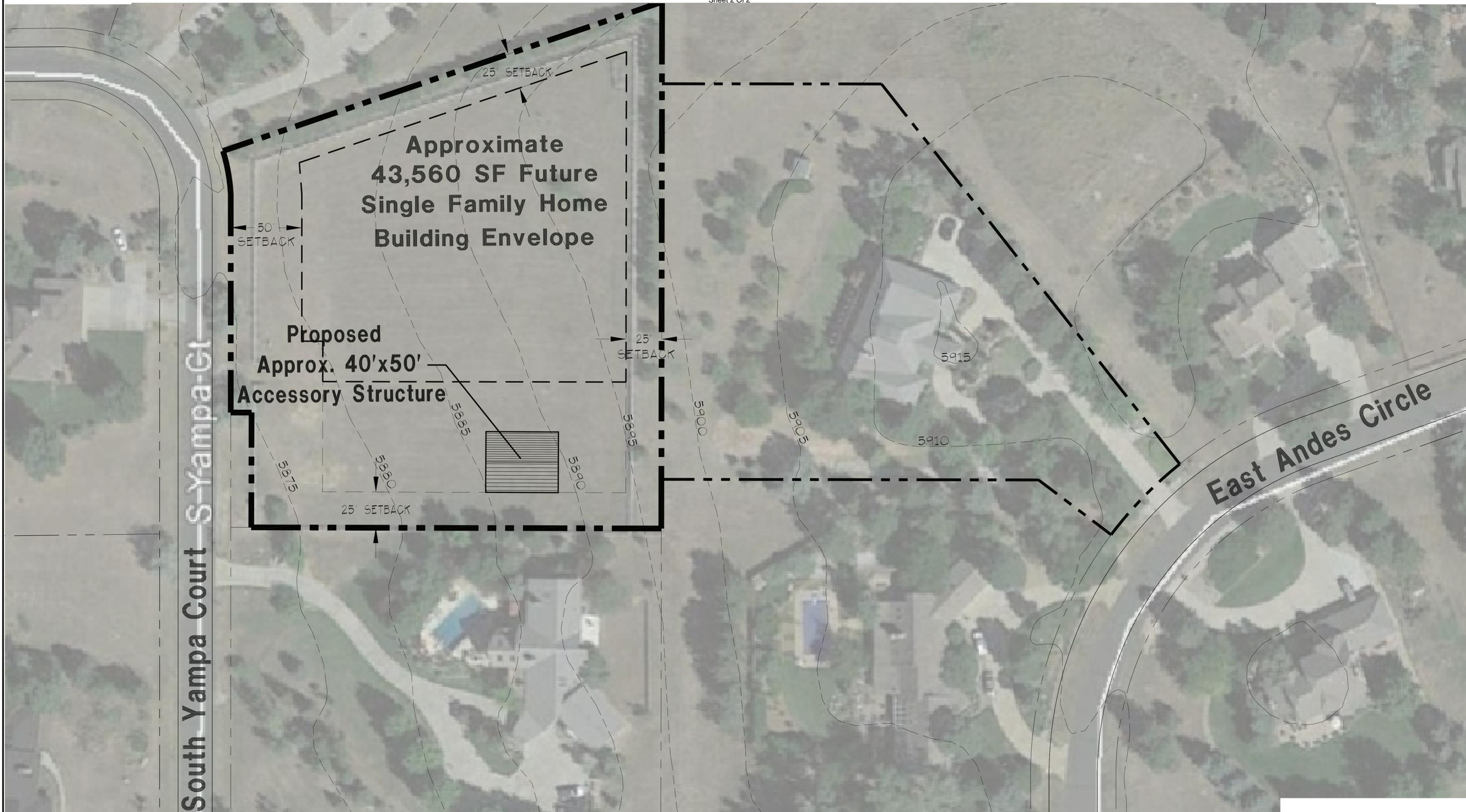
Behr Family Trust Property
6972 So. Yampa Court
VARIANCE REQUEST

Date Prepared: 05/11/20
Revisions:

PAUL & SUZANNE BEHR PROPERTY

Variance Request Conceptual Sketch Plan

Lot 3, Block, Sierra Vista Estates Subdivision, Filing No. 4
Town Of Foxfield, Colorado
Sheet 2 Of 2



Prepared By:
Planner:



Kirby Smith & Associates, Inc.
Land Planning • Site Design • Landscape Architecture
6201 So. Hudson Court, Centennial, CO 80121
(303) 694-9464 FAX (303) 694-9272

Prepared For:
Paul & Suzanne Behr
c/o Paul C. Behr
6993 S. Andes Court
Centennial, CO 80016
(303) 807-1108

Behr Family Trust Property
6972 So. Yampa Court
VARIANCE REQUEST

Date Prepared: 05/11/20
Revisions:

Joel M. Spector, Esq.

October 30, 2020

Town of Foxfield Town Clerk
c/o Randi Gallivan
P.O. Box 461450
Foxfield, Colorado 80046

Re: Supplement to the May 11, 2020 letter concerning Paul C. Behr and Suzanne F. Behr's property at 6972 S. Yampa Court.

Dear Mr. Gallivan and the Town of Foxfield Board of Trustees,

I am an attorney writing on behalf of my clients Paul C. Behr and Suzanne F. Behr. On May 11, 2020, Kirby Smith, on behalf of the Behrs, sent a letter requesting a variance from the Town of Foxfield to construct an accessory structure on the Behrs' vacant property at 6972 S. Yampa Court. Since that letter was sent, it has come to the Behrs' attention that there is some uncertainty regarding satisfaction of the hardship requirement. This letter is intended to supplement the May 11, 2020 letter to address the hardship requirement in greater detail, and, in particular, to explain why the Behrs' proposed project satisfies the hardship requirement.

I. Background

I suspect you are already familiar with the facts underlying this matter, which are set out in greater detail in the May 11, 2020 letter. Accordingly, I will summarize the background facts just briefly.

The Behrs own property improved with a single-family residence in Centennial, Colorado, and an adjacent vacant lot in Foxfield, Colorado that is zoned RR (Large Lot Rural Residential). The Behrs would like to build an accessory structure, similar to the types of accessory structures identified in Foxfield Municipal Code § 16-2-50(b)(2), on their Foxfield lot. Foxfield Municipal Code § 16-2-50(d)(5) provides: "Accessory structures and uses are not permitted unless and until the principal permitted use has been established on the property"; see also § 16-2-40(c) ("No accessory uses are allowed if not associated with a principal use and are not allowed if the principal use as not been established.").

The Behrs already have a single-family residence on their adjacent lot in Centennial. Building another single-family residence on the Foxfield lot as a prerequisite to building the Behrs' proposed accessory structure would be financially burdensome, an unnecessary use of resources, and inconsistent with the public's interests, as set forth in Foxfield's master plan. Accordingly, the Behrs have requested a variance.

Per Municipal Code § 16-5-70, a variance can be approved only upon the satisfaction of several distinct conditions. The May 11, 2020 letter describes why the Behrs' application would satisfy each of these conditions.

Of particular note, to be granted a variance, the applicant for a variance will have to show:

The applicant would suffer hardship as a result of the application of this Chapter, which hardship is not generally applicable to other lands or structures in the same zone district because of the unusual configuration of the applicant's property boundaries, because of unique circumstances related to the location of existing structures thereon or because of the existence of exceptional topographic conditions thereon.

Municipal Code § 16-5-70(a)(2)(a).

This letter is intended to supplement the May 11, 2020 letter to further explain why the Behrs' application satisfies this hardship requirement.

II. Discussion

As explained in the May 11, 2020 letter:

The Behr Family own[s] the lot immediately to the east and adjacent to the subject lot, where their primary residence is located. [The Behrs] purchased the subject lot to function as a visual open space buffer, in order to preserve their home's mountain view. Due to the 16-2-50 (d)(5) provision, the owner is unable to build an accessory structure on this lot because of the unusual configuration of the property boundary which separates the owner's primary residence from the remainder of their property ownership. The result of the application of the provision listed above would mean that the owner would need to first establish a single family detached dwelling on this lot before an accessory structure could be built. For a retired couple with a home overlooking this property, the construction of another home (at the cost of between \$700,000 and \$720,000) would constitute a significant hardship.

Colorado law further supports a finding that the Behrs satisfy the hardship requirement. In Wood Bros. Homes, Inc. v. Colorado Springs, 568 P.2d 487 (Colo. 1977), the City of Colorado Springs required that developers fund the construction of drainage facilities as a precondition for development. Id. at 488-489. When Wood Bros. sought to develop some land, Colorado Springs demanded that Wood Bros. construct drainage facilities to "point C" a considerable distance from the proposed development. Id. at 489. Wood Bros. sought a variance from Colorado Springs because the construction of such a large drainage facility would constitute an undue hardship. Id. When the variance was denied, Wood Bros. filed suit.

The trial court found that only 2% of the effluent in the proposed drainage facility would come from Wood Bros.'s proposed development, yet Colorado Springs was requiring Wood Bros.

to pay the entire \$282,000 for construction of the drainage facility. Id. Thus, the trial court ruled that Colorado Springs’s decision to deny the variance was arbitrary and capricious. Id. at 490.

On appeal, the Colorado Supreme Court affirmed the trial court and ruled that Colorado Springs’s refusal to grant the variance constituted an abuse of discretion. Id. at 491. In so doing, the Court provided perhaps the only authoritative definition on “hardship” in Colorado.

Adopting the “hardship” rationale in Beerman v. City of Kettering, 237 N.E.2d 644 (Ohio 1965), the Colorado Supreme Court explained that a court must first look at whether a literal enforcement of a zoning ordinance would work a substantial and unnecessary injustice. If so, the court must then look at whether the unjust measure is necessary to carry out the purpose of the ordinance. “In effect, [the] court balance[s] individual hardship against public benefit.” Wood Bros. Homes, Inc. v. Colorado Springs, 568 P.2d at 491.

Balancing Individual Hardship Against The Public Benefit of Strict Enforcement of Zoning Code

A. Individual Hardship

The financial hardship on the Behrs has already been well documented. In the absence of a variance, the Behrs would have to spend an additional \$700,000+ to construct a single-family residence on the property prior to building the accessory structure.

Generally speaking, though, financial hardship is not enough, standing alone, to establish a hardship; there must be some other fact in support of a hardship. Wood Bros. Homes, Inc. v. Colorado Springs, 568 P.2d at 491. For instance, in Beerman, the court determined that financial hardship coupled with certain characteristics of the land satisfied the variance’s hardship requirement.

Here, the hardship is not based solely on the financial burden. In other words, it is not simply that compliance with the zoning code would be expensive for the Behrs. It is that construction of a second single-family residence is unnecessary, undesired, and a waste of resources given the presence of the Behrs’ existing single-family home located on their adjacent lot in Centennial. Stated differently, even if the Behrs could readily spend \$700,000+ to construct a single-family residence on the Foxfield lot, the newly-built residence would serve no beneficial purpose and the unnecessary primary structure would detract from the character of the Behrs’ two adjacent properties.

Ultimately, the absence of a variance would cause the Behrs to suffer a substantial and unnecessary individual hardship.

B. Public Benefit of Strict Enforcement of the Zoning Code

Per Wood Bros., the Behrs’ individual hardship must be balanced against the public benefit of strict enforcement of the zoning code. Imagine a teeter-totter with the individual hardship on one side and the public benefit of strict enforcement of the zoning code on the other side. To satisfy the

hardship requirement, the teeter-totter must lean down towards the individual hardship and up on the public benefit of strict enforcement side.

This matter, however, presents the unusual case in which the public benefit of not enforcing the zoning code is actually *consistent* with granting the variance and against strict enforcement of the zoning code. In other words, the public benefit and the individual hardship are both on the same side of the teeter-totter, and there is nothing on the opposite side.

A variance here would benefit the public, as evidenced by the zoning code and Foxfield's master plan, both of which indicate the public benefit of preserving the rural character of Foxfield and encourage minimizing dense development and congestion.

Per Municipal Code § 16-1-30, the purpose of the zoning code is to promote the health, safety, convenience, order, prosperity and welfare of the present and future residence of the Town by, among other things, lessening of congestion on streets and roads, protecting urban and non-urban development, *and implementing the comprehensive master plan.*

Section 4.1 of Foxfield's comprehensive master plan states that its goal is to "enhance and protect the existing low density, single family, and rural character of the community." To do so, the master plan seeks to (among other things):

- Maintain the standard of single-family residential development on rural estate lots.
- Encourage appropriate and compatible development of currently undeveloped land.
- Encourage development that is compatible with a rural character, in terms of land use, scale or other characteristics.

Section 4.2 of Foxfield's master plan further states that its goal is to "allow only land uses in the community which are compatible with a well-cared for rural, low density character." To do so, the master plan seeks to (among other things):

- Maintain the minimum standard of one residential unit per approximately 2.5 acres except for specific areas identified on the Master Plan map.
- Encourage flexibility and common sense in development the remaining undeveloped land in order to achieve compatible land use and site planning while providing benefits to the Foxfield community as a whole.

Section 4.3 of Foxfield's master plan further states that its goal is to "encourage creative and flexible planning for the land which remains undeveloped." To do so, the master plan seeks to (among other things):

- Encourage flexible site planning to allow for the creation of public open space, including planned development techniques.
- Consider environmental conditions of a site and its surrounding area when evaluating new development.

Thus, Foxfield has already determined that the public benefits from low density development, rather than construction of unwanted and unnecessary residences. Yet a strict application of the zoning code would, as a prerequisite to building an accessory structure, require construction of an additional single-family residence, when all that is desired is an accessory structure next to an existing residence that happens to lie on the other side of an invisible lot line.

Ultimately, the purpose of a variance is to eliminate “the necessity of a slavish adherence to the precise letter of the limitations where in a given case little or no good on the one side and undue hardship on the other would result from a literal enforcement and to protect the ordinance against attack on the ground of unreasonable interference with private rights.” Peterson v. Vasak, 76 N.W.2d 420, 427 (Neb. 1956)). Both the individual hardship and the public benefit weigh in favor of granting a variance here.

* * *

Cases from jurisdictions outside of Colorado also support the conclusion that the Behrs satisfy the hardship requirement. Stice v. Gribben-Allen Motors, Inc., 216 Kan. 744 (1975), a case cited favorably by the Colorado Supreme Court in Wood Bros., provides that an unnecessary hardship arises when “the use restriction, viewing the property in the setting of its environment, is so unreasonable as to constitute an arbitrary and capricious interference with the basic right of private property” Id. at 751 (quoting Peterson v. Vasak, 76 N.W.2d 420 (Neb. 1956)).

Similarly, Beerman, supra, states: “The essential inquiry on an application for a variance on the ground of undue hardship is whether, in the circumstances exhibited, the denial thereof would constitute an unjust and unnecessary invasion of the fundamental right of property.” Id. (quoting cases from other jurisdictions).

Here, the accessory structure would be allowed but for an imaginary line separating lots in Foxfield from Centennial. Accordingly, should Foxfield’s zoning regulations be applied strictly, they would likely be deemed an arbitrary and capricious, unjust and unnecessary restriction on the Behr’s property rights to build an accessory structure.

Finally, it should be noted that other states have variations on the Wood Bros. balancing test for the hardship requirement. For instance, in Simplex Technologies v. Town of Newington, 145 N.H. 727 (2001), the New Hampshire Supreme Court acknowledged that under the then-existing rule, property owners seeking a variance had to show that application of the ordinance would effectively prevent the owner from making any reasonable use of the land. Id. at 730. But the New Hampshire Supreme Court rejected such a restrictive rule in favor of a much more lenient rule. Under the new rule, applicants for a variance may establish an unnecessary hardship by showing that (1) a zoning restriction as applied to their property interferes with their reasonable use of the property, considering the unique setting of the property in its environment; (2) no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property; and (3) the variance would not injure the public or private rights of others. Id. at 731-732. As demonstrated above, the Behrs would satisfy this hardship standard as well.

III. Conclusion

The Behrs believe they are able to satisfy all the requirements for a variance, including the hardship requirement. They would appreciate the opportunity to have a pre-application meeting with the relevant parties to further discuss the variance.

Thank you.

Sincerely,

A handwritten signature in cursive script that reads "Joel M Spector".

Joel M. Spector

Town of Foxfield Town Clerk
c/o Randi Gallivan
P.O. Box 461450
Foxfield, Colorado 80046

Re: Supplement to the May 11, 2020 letter concerning Paul C. Behr and Suzanne F. Behr's property at 6972 S. Yampa Court.

Dear Ms. Gallivan and the Town of Foxfield Board of Trustees,

I've been asked to give my opinion on a proposed outbuilding's impact on the value of a vacant lot in Foxfield, owned by Paul & Suzanne Behr.

Before giving my Position, I'd like to give you a little bit of my background. I'm Jerilee Peterson, from mile hi modern. Mile hi modern is a boutique, luxury home real estate brokerage, focusing on the artistry of living. Our purpose is to bring the story to light of every home we represent, the intrinsic value as well as the unique edge and architecture. We are also one of the top producing offices in Denver.

I have lived previously in Antelope East after building a home there in 1992. I sold the property in 2007, which at the time was the highest sold property in Antelope- \$610,000.

I worked for 4 yrs. for a luxury, national builder, Toll Brothers, as their Sales Manager in Castle Pines Village and sold out my inventory in 4 years—100 homes for shy of 100 Million. I've worked in real estate for 21 years. I currently work both resale and New Development throughout the Denver Metro and surrounding areas.

I was approached based on my experience as well as my knowledge from having lived on close in, rural horse property for 15 years. After visiting the property here are my comments:

For purposes of consistent terminology, the proposed accessory structure is essentially an "outbuilding" similarly to many others within Foxfield. In walking the lot, it appears to me to be one of, if not the best lot in Foxfield for a variety of reasons. First, the views stretch from Northern to Southern Colorado, including Longs Peak to Pikes. It is a lot with beautiful older trees outside of the sprawling, pristine white fencing. The lot seems to be fairly flat and gently falling away towards the South and West, perfect for drainage/septic field.

The owners want to simply build an outbuilding. Many such out buildings already exist throughout Foxfield. Some are barns or garages. Others are part of a breezeway to both the house and garages. There is even one red barn all alone a few streets away. The Behr's lot is particularly notable because of its views, lot topography, natural mature trees, landscape, and fencing. All of those advantages, along with the lack of vacant lots, add up to a very valuable and sought after lot if marketed. By adding an outbuilding, without a home first, this lot's value would not be diminished. In fact, the proposed outbuilding will increase the lot's value, in my opinion. The owners want to add an improvement that could easily be incorporated into a future home with a breezeway, or could, in and of itself, create a style that projects the beauty of Foxfield and surrounding properties.

I have included photos for your review from my research. The photos are of the Behr's Foxfield lot, homes with breeze ways connecting to outbuildings/garages, and the single red barn a few blocks away from the subject property.

Please feel free to reach out to me with any questions. I appreciate your time and consideration.

Warmly,

Jerilee

jerilee **peterson** | BROKER ASSOCIATE | 303. 257. 9887 | milehimodern.com
lohi 2015 West 32nd Avenue | **cherry creek** 44 Cook Street

Jerilee Peterson Letter - Attachment A
Paul & Suzanne Behr Foxfield Lot- 6972 S. Yampa Court
Looking west across the Behr's Foxfield lot



Looking east across the Behr's Foxfield lot (toward their home)



Looking west from the Behr's home (and across the Behr's Foxfield lot)



Jerilee Peterson Letter - Attachment B
Foxfield Accessory Building Examples

Residence
Breezeway
Accessory Building

Accessory Building attached to primary residence with a breezeway (7012 S. Telluride Street)



Accessory Building attached to primary residence with a breezeway (17618 East Davies Ave.)



Accessory Building

Breezeway

Residence

Single Red Barn - existing accessory structure on vacant RR lot (Gartright property on S. Sedalia Street, south of Gartright residence at 17618 East Davies Ave.)



(See Variance Request Vicinity Map & Foxfield Vacant RR Lots exhibit for location)