



Rowan County Department of Planning & Development  
402 North Main Street – Suite 204 – Salisbury, NC 28144  
Phone: (704) 216-8588 [rowancountync.gov/planning](http://rowancountync.gov/planning)

## MEMORANDUM

TO: Rowan County Board of Adjustment  
FROM: Shane Stewart, Assistant Planning Director  
DATE: August 15, 2024  
RE: **BOA 04-24: Ken Mills**

### BOARD OF ADJUSTMENT ACTION

- Sworn oath for those testifying
- Receive staff report
- Petitioner comments
- Testimony from others
- Close hearing and discuss
- Motion to adopt findings of fact
- Approve / Deny / Table **BOA 04-24**

**BACKGROUND** On July 5, 2024, property owner Ken Mills applied for a zoning permit to construct a 30' x 40' (1,200 sf) accessory structure beside his residence at 127 Chippewa Trail, further referenced as Tax Parcel 225A-061. Mr. Mills submitted a very basic sketch of the proposed location, which was not to scale, and obtained zoning permit ZP-21583-2024 the same day (see Attachments A & B). Within a few hours and upon a subsequent review, Planning Staff (staff) noticed the proposed location appeared to extend into both the front and side setbacks. Staff contacted Mr. Mills to halt any construction and obtain a property survey to confirm setbacks.

On August 4<sup>th</sup>, Mr. Mills obtained a survey verifying the property lines, road right of way, and proposed building setbacks. The proposed structure size and location could not meet either the required front and side setbacks nor the 50% maximum setback reduction with a variance. Mr. Mills revised his building size to a 30' x 30' (900 sf) to remain under the 50% threshold.

**REQUEST** Ken Mills is requesting an approximate twenty (20) foot variance from the required fifty (50) foot front setback and a five (5) foot variance from the required ten (10) foot side setback as required in section 21-84 of the Zoning Ordinance for Residential Suburban (RS) zoned property (see Attachments C, D, and G).

## **VARIANCE CRITERIA**

In accordance with section 21-332(2) of the Zoning Ordinance, “*A variance shall be granted by the BOA if it concludes that strict enforcement of this chapter would result in unnecessary hardships for the applicant. The board may reach these conclusions if it makes the following findings:*”

Variance criteria are listed in bold black text followed by staff comments in regular text. Refer to the enclosed application for applicant responses and the enclosed article from Adam Lovelady, Professor of Public Law and Government at the University of North Carolina at Chapel Hill, entitled *Variance Standards: What is hardship? And when is it unnecessary?* for additional guidance in making a decision (see Attachment E).

- 1. Unnecessary hardship would result from the strict application of the ordinance. It is not necessary to demonstrate that, in the absence of the variance, no reasonable use can be made of the property;**
  - The selected site location coupled with building size and orientation are at odds with the curved right of way frontage and competing angle of the side lot line. Staff discussed with Mr. Mills various options including a reduced building size or relocation to other areas of the property. Mr. Mills verbally cited factors supporting his decision to apply for the requested variance, which are not included in his application. Mr. Mills will need to demonstrate a hardship based on these factors with satisfactory evidence presented at the board meeting.
- 2. The hardship results from conditions that are peculiar to the property such as location, size, or topography. Hardships resulting from personal circumstances and / or conditions common to the neighborhood or general public may not be the basis for granting a variance. A variance may be granted when necessary and appropriate to make a reasonable accommodation under the Federal Fair Housing Act for a person with a disability;**
  - The subject property was established in 1999 as a single lot division from property owned by the Warrior Golf Club LLC containing the #6 green immediately south and a golf cart path along the eastern side property line. Except for adjoining Tax Parcel 225A-026 to the west, surrounding lots were established in 1976 as part of the SLECA-WA subdivision, which is one of several residential subdivisions surrounding the Warrior Golf Course.
  - This 1.13 acre parcel (based on GIS) is slightly larger than the majority of surrounding lots, which are just under one (1) acre.
  - Mr. Mills will need to demonstrate conditions peculiar to the property and not his personal circumstances (see Attachment F).

3. **The hardship is not the result of the property owner or applicant's own actions. The act of purchasing property with knowledge that circumstances exist that may justify the granting of a variance is not a self-created hardship;**
  - In the traditional sense, the hardship is not self-created.
4. **The requested variance is consistent with the spirit, purpose, and intent of the ordinance, such that public safety is secured and substantial justice is achieved;**
  - As with any variance request, the applicant must demonstrate property conditions are the source of the hardship and not personal circumstances or a desire for different standards. This criterion safeguards a sense of "fairness" since all properties in the county have setback requirements and their own inherent degree of "limitation". While each request is evaluated based on individual merit, similar properties / circumstances should generally expect the same outcome.
5. **The variance will not result in a land use otherwise not permitted in the applicable zoning district nor authorize the extension of a nonconforming situation in violation of article VI, or other applicable provisions of this chapter; and**

N/A. This request is not a use variance.

6. **If applicable, the setback reduction is no more than fifty (50) percent of that required and the resulting setback is no less than five (5) feet from any property line or right-of-way.**

According to the survey, the applicant would not exceed the 50% threshold nor be less than five (5) feet to a property line or right of way.

**PROCEDURE** The BOA shall determine the contested facts and make its decision based on competent, material, and substantial evidence. Prior to granting a variance, the BOA must vote affirmatively on all six (6) above criteria with a four-fifths (4/5) vote providing specific reasons or findings supporting the motions. impose appropriate conditions reasonably related to the variance request. A motion to deny the variance request may be made on the basis that one (1) or more of the criteria are not satisfied and shall include specific reasons or findings supporting the denial.

Each decision of the BOA is subject to review by superior court if appealed within thirty (30) days of the signed decision filed in the office of the Clerk to the Board of Commissioners.

**PUBLIC NOTICE** August 14<sup>th</sup> – Letters mailed to seven (7) adjoining property owners.

August 14<sup>th</sup> – Sign posted on property.

August 16<sup>th</sup> – Request posted on department website.



**STAFF COMMENTS** Mr. Mills will need to demonstrate, with additional evidence, justification for a variance as his application merely expresses the need with no cited factors.

**ENCLOSURES**

- Attachment A: Zoning Permit
- Attachment B: GIS Map
- Attachment C: Application
- Attachment D: Section 21-84 excerpt
- Attachment E: UNC Article
- Attachment F: Site Pictures
- Attachment G: Proposed Location Survey

## **Attachment A**



# Rowan County Planning & Development Department

402 North Main Street, Suite 204, Salisbury, NC 28144

Phone: (704) 216-8588 Fax: (704) 638-3130

<http://www.rowancountync.gov>

## ZONING PERMIT

**Plan Case #**  
ZP-021583-2024

**Parcel ID**  
225A061

**Project**

**Application Date**  
07/05/2024

**Proposed Use**  
Accessory Structure

**Previous Use**  
Single Family Dwelling

**Sq. Ft.**  
1,200

**Physical Address**  
127 CHIPPEWA TR  
China Grove, NC 28023

**Applicant**  
Kenneth & Deborah Mills

**Address**  
127 Chippewa Tr  
China Grove, NC 28023

**Phone**  
7047773738

**Principle Structure Setbacks**  
Front 50 Side 10  
Side Street 20 Rear 10

**Owner**  
Kenneth & Deborah Mills

**Address**  
127 Chippewa Tr  
China Grove, NC 28023

**Phone**  
7047773738

**Accessory Structure Setbacks**  
Front 50 Side 10  
Side Street 10 Rear 10

**Contractor**  
Kenneth & Deborah Mills

**Address**  
127 Chippewa Tr  
China Grove, NC 28023

**Phone**  
7047773738

**Issued by:**  
Ryan Mickey

**Zoning District**  
RS

**Overlay District**

**Flood Zone**  
X

**FIRM Panel**  
3710561700

**Lot Size**  
1.13

**Subdivision**  
SLECA-WA

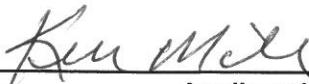
**Water Supply**  
Indiv Well

**Sewage Disposal**  
Septic System

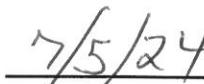
### Additional Requirements / Comments:

Zoning Permit for a 1200SF accessory structure/garage for personal use only. Structure will comply with listed front and side setbacks for RS zoning per property owner.

I hereby certify that I am aware of and will comply with the conditions indicated on this permit, the approved site plan (if any), an applicable provisions of the Zoning Ordinance. Structures or land authorized by this permit will only be used or occupied in compliance with permit conditions. Furthermore, I understand that any changes made to this project may require additional approvals and that a building permit may also be necessary for project approval. This permit remains valid if the work authorized by the permit commences within one (1) year of the issuance date and all other required permits are obtained.



Applicant's Signature



Date



Authorized Zoning Signature

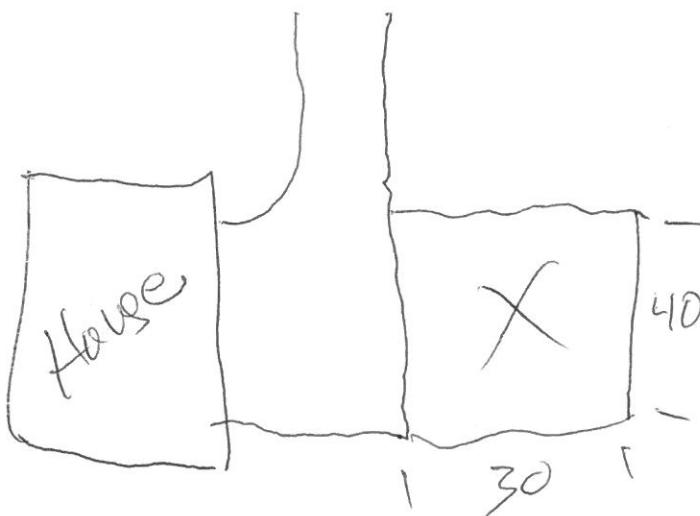


Date



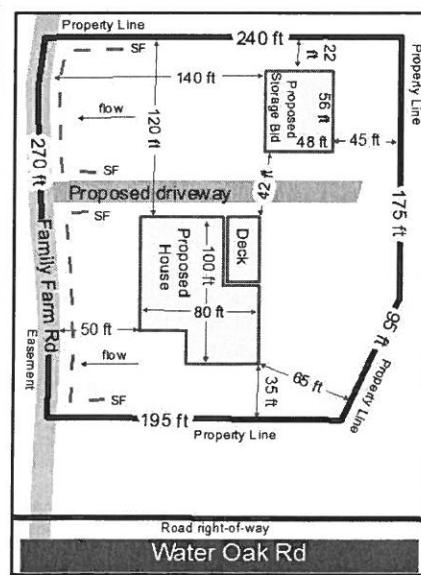
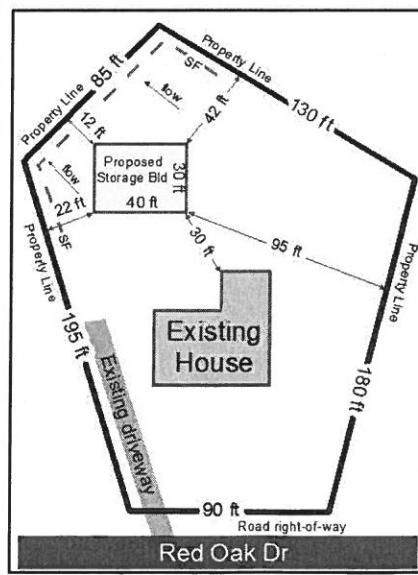
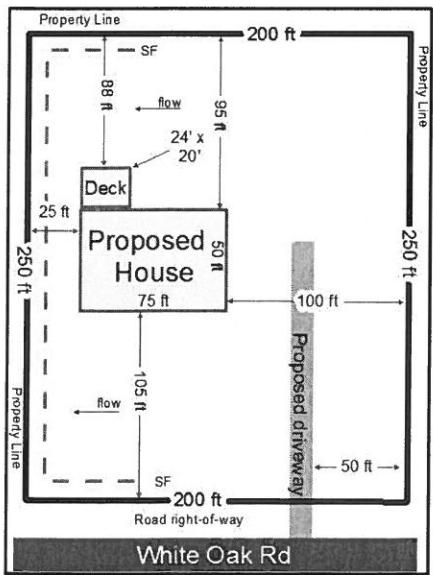
**INSTRUCTIONS** – Prepare a site plan with the following information:

1. Parcel ID \ Address
2. Property lines with dimensions
3. Adjoining roads & driveway with distance from property lines
4. Proposed building with dimensions and distance from property lines
5. Existing buildings and distance from proposed buildings
6. If grading, show location of silt fence (SF) on low side of construction.



Submitted by: \_\_\_\_\_ Date: \_\_\_\_\_

**SITE PLAN EXAMPLES**



## **Attachment B**

BOA 04-24:Reed

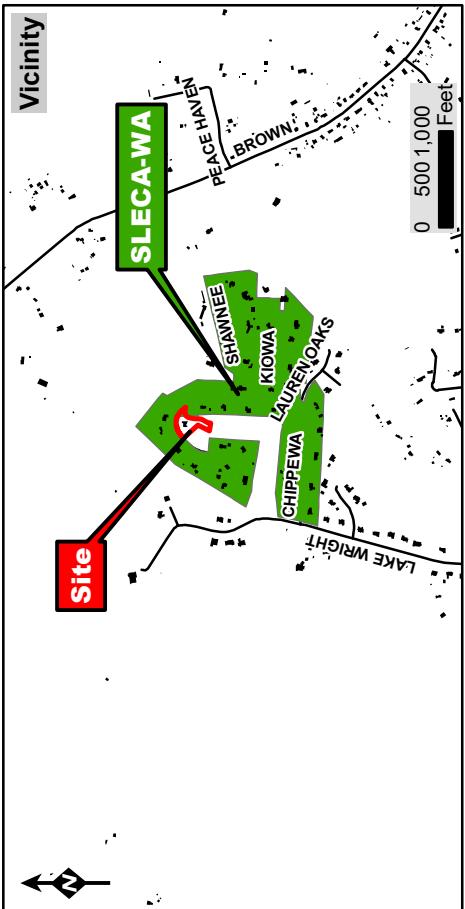


## Legend

<input type="checkbox"/> Parcels	 SLECA-WA	Feb / Mar 22 Aerials
<input checked="" type="checkbox"/> TP 225A-061	 Roads	
<input type="checkbox"/> Buildings	 Address	<b>350</b>

Prepared by: Bowen County Planning Dept. 8/15/24

## Vicinity



## **Attachment C**



BOA 04-24

Rowan County Department of  
Planning & Development  
402 N. Main Street Ste 204  
Salisbury, NC 28144  
Phone (704) 216-8588  
Fax (704) 638-3130  
[www.rowancountync.gov](http://www.rowancountync.gov)

Case #	_____
Date Filed	8/5/24
Received By	SAS
Amount Paid	\$200 via cc
Office Use Only	

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## VARIANCE APPLICATION

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### OWNERSHIP INFORMATION:

Name: Ken Mills  
Signature: Ken Mills  
Phone: 704-277-3738 Email: kmills201958@gmail.com  
Address: 127 Chippewa Trl China Grove NC 28023

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### APPLICANT / AGENT INFORMATION:

Name: Same as above  
Signature: \_\_\_\_\_  
Phone: \_\_\_\_\_ Email: \_\_\_\_\_  
Address: \_\_\_\_\_  
\_\_\_\_\_

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### PROPERTY DETAILS:

Variance Requested on Property Located at: 127 Chippewa Trl (SAS)  
Tax Parcel: 225A-061 (SAS) Zoning District: RS (SAS)

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### TO THE ROWAN COUNTY ZONING BOARD OF ADJUSTMENT:

I Ken Mills, hereby petition the Board of Adjustment for a **VARIANCE** from the provisions of the Rowan County RS Ordinance because, under the interpretation given to me by the Administrator\*, I am prohibited from using the parcel of land described above in a manner shown by the Plot Plan attached to this form. I request a variance from the following provisions of the ordinance (cite Section & Code req.):

DB. 796/PG. 55 Pid# 225A067

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## FACTORS RELEVANT TO THE ISSUANCE OF A VARIANCE:

The Board of Adjustment may grant a variance if it concludes that strict enforcement of this ordinance would result in unnecessary hardships for the applicant. The Zoning Board of Adjustment, in granting, shall ensure that the spirit of this ordinance is maintained, public welfare and safety ensured, and substantial justice done. In the following spaces, indicate the facts and argument you plan to render, in order to convince the Board, to properly determine that their conclusions or findings of fact are applicable.

- 1) Unnecessary hardship would result from the strict application of the ordinance. (It shall not be necessary to demonstrate that, in the absence of a variance, no reasonable use can be made of the property);

I would not be able to build my garage if the variance is not approved. I have cars to store in the building and need a 30x30.

- 2) The hardship results from conditions that are peculiar to the property such as location, size, or topography. (Hardships resulting from personal circumstances and / or conditions common to the neighborhood or general public may not be the basis for granting a variance);

24x30 is not sufficient for attended use. 30x30 is needed per requested permit

- 3) The hardship is not the result of the property owner or applicant's own actions. (The act of purchasing property with knowledge that circumstances exist that may justify the granting of a variance shall not be regarded as a self created hardship);

I was unaware of the variance. This is my first time dealing with this.

- 4) The requested variance is consistent with the spirit, purpose, and intent of the ordinance, such that public safety is secured and substantial justice is achieved;

The variance is needed in order to build a 30x30 garage to store my vehicle. Public safety is not an issue. The building will be secured when not being used.

5) The variance will not result in a land use otherwise not permitted in the applicable zoning district nor authorize the extension of a nonconforming situation in violation of article VI, or other applicable provisions of this chapter;

*Six foot Variance is for personal use only  
and was given to me by the Warrior Golf Club*

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6) If applicable, the setback reduction is no more than fifty (50) percent of that required and the resulting setback is no less than five (5) feet from any property line or right-of-way.

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I certify that all the information presented by me in this application is accurate to the best of my knowledge information and belief.

*Ken Miller*  
Signature

*8/5/24*  
Date

\* Includes administrators and enforcement officers with the Department of Planning and Development.

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**OFFICIAL USE ONLY**

1. Signature of Coordinator: *[Signature]* 2. ZBA Hearing: 8 / 26 / 24  
3. Notifications Mailed: 8 / 14 / 24 4. Property Posted: 8 / 14 / 24 5. ZBA Action: Approved \_\_\_\_\_  
Denied \_\_\_\_\_ 6. Date Applicant Notified: \_\_\_\_\_ / \_\_\_\_\_ / \_\_\_\_\_ 7. Date CMO Notified: \_\_\_\_\_ / \_\_\_\_\_ / \_\_\_\_\_

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August 5, 2024

Name of Project: 127 Chippewa Garage

Dear Warrior Golf Club,

I am writing this letter to inform you that I am applying for a building permit with the Rowan County Permit office to build a garage on the property adjacent to my driveway at 127 Chippewa Trail. I am also applying for a variance of 6 feet between my property and the cart path to make this work. With The Warrior Golf Club's permission, the county may be more inclined to approve this request. I would appreciate it if you would sign this letter giving your permission for this variance before I submit the request to the county.

Thanks in advance for your help,

Ken Mills

Ken Mills  
704-777-3738

Mark H.

The Warrior Golf Club Representative Signature

## **Attachment D**

## Sec. 21-84. Table of dimensional requirements.

DISTRICTS	RA	RR	RS	MHP	MFR	AI	CBI	NB	INST	IND
<b>Minimum zone lot size<sup>(1)(3)</sup></b>										
Septic tank and individual or multi-connection well	20,000 sq ft	20,000 sq ft	20,000 sq ft	6 acres	2 acre with 3 du/acre <sup>(2)</sup>	N/A	N/A <sup>(2)</sup>	20,000 sq ft	N/A	N/A
<b>Minimum zone lot size<sup>(1)(3)</sup></b>										
Public water or community water or Public sewer or approved package treatment plant	15,000 sq ft	15,000 sq ft	15,000 sq ft	6 acres	2 acre with 8 du/acre <sup>(2)</sup>	N/A	N/A <sup>(2)</sup>	15,000 sq ft	N/A	N/A
<b>Minimum zone lot size<sup>(1)(3)</sup></b>										
Public water and sewer	10,000 sq ft	10,000 sq ft	10,000 sq ft	6 acres	2 acre with 12 du/acre <sup>(2)</sup>	N/A	N/A <sup>(2)</sup>	10,000 sq ft	N/A	N/A
Minimum lot width at right-of-way	35 ft	35 ft	35 ft	35 ft	35 ft <sup>(6)</sup>	35 ft	35 ft	35 ft	35 ft	35 ft
Minimum lot width at Building setback line	70 ft	70 ft	70 ft	70 ft	70 ft <sup>(6)</sup>	70 ft	70 ft	50 ft	70 ft	70 ft
<b>Minimum lot depth</b>										
Without public water & sewer	150 ft	150 ft	150 ft	150 ft	150 ft <sup>(6)</sup>	100 ft	100 ft <sup>(2)</sup>	100 ft <sup>(2)</sup>	150 ft	150 ft
Public water and sewer	125 ft	125 ft	125 ft	125 ft	125 ft <sup>(6)</sup>	100 ft	100 ft	100 ft	125 ft	150 ft
<b>Principal structure setback</b>										
Front Yard <sup>(4)</sup>	30 ft	30 ft	50 ft	50 ft	50 ft <sup>(6)</sup>	50 ft	50 ft <sup>(2)</sup>	30 ft	30 ft	50 ft
Side street	20 ft	20 ft	25 ft	50 ft	50 ft <sup>(6)</sup>	25 ft	30 ft <sup>(2)</sup>	20 ft	20 ft	30 ft
Side yard <sup>(4)</sup>	10 ft	10 ft	10 ft	50 ft	50 ft <sup>(6)</sup>	10 ft	10 ft or 0 ft <sup>(2)</sup>	10 ft or 0 ft <sup>(7)</sup>	10 ft	10 ft or 0 ft
Rear yard <sup>(4)</sup>	10 ft	10 ft	20 ft	50 ft	50 ft <sup>(6)</sup>	20 ft	10 ft or 0 ft <sup>(2)</sup>	10 ft or 0 ft <sup>(2)(7)</sup>	10 ft	10 ft or 0 ft
<b>Accessory structure setback<sup>(8)</sup></b>										
Front	30 ft	30 ft	50 ft	50 ft <sup>(5)</sup>	50 ft <sup>(6)</sup>	50 ft	10 ft	10 ft	10 ft	10 ft
Any right-of-way	10 ft	10 ft	10 ft	30 ft <sup>(5)</sup>	50 ft <sup>(6)</sup>	10 ft	10 ft	10 ft	10 ft	10 ft
Side and rear yard	10 ft	10 ft	10 ft	10 ft <sup>(5)</sup>	10 ft <sup>(6)</sup>	10 ft	10 ft	10 ft	10 ft	10 ft

- (1) May be increased based on location in regulated watershed.
- (2) For single family use standards for RA district.
- (3) For individual lot size/space standards in an MHP district refer to section 21-60(11)n.
- (4) For individual space setbacks in an MHP district refer to section 21-60(11)d.
- (5) From exterior property lines.
- (6) Requirements may be modified or exempted as provided by section 21-60(16). Dimensional criteria for subdivided lots shall be as provided for in the RA district, excluding external boundaries of the development.
- (7) See "special requirements" for NB district for setbacks from residential zoning districts.
- (8) Refer to section 21-285 for additional standards.

(Ord. of 1-19-98, § V; Ord. of 2-1-99(1), § 12; Ord. of 10-18-99(1); Ord. of 6-17-02; Amend. of 3-7-05; Amend. of 11-2-09; Amend. of 3-5-12; Amend. of 1-22-13; Amend. of 4-21-14; Amend. of 1-17-23)

## **Attachment E**

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## Coates' Canons Blog: Variance Standards: What is hardship? And when is it unnecessary?

By Adam Lovelady

Article: <http://canons.sog.unc.edu/variance-standards-what-is-hardship-and-when-is-it-unnecessary/>

This entry was posted on May 27, 2014 and is filed under Land Use & Code Enforcement, Quasi-Judicial Decisions, Zoning

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Generally, development regulations like zoning and subdivision standards apply equally to all properties. But sometimes a particular property is unfairly burdened by the general rules, creating an unnecessary hardship for the owner. The general statutes authorize the local board of adjustment to grant a variance from the rules in those limited circumstances. But what is an unnecessary hardship? Recent amendments to the state statute clarify what can (and what can't) qualify as unnecessary hardship. This blog explores those new standards.

General Statute section [160A-388\(d\)](#) sets forth the standards for granting a zoning variance (The standards also may be applied to subdivision and other development regulation). These mandatory standards apply to zoning variances for all counties and municipalities in the state, and the new standards override any contrary ordinance provisions that may have been in place prior to 2013. For a summary of the other changes to the board of adjustment statute, see this [blog](#) from my colleague David Owens.

Under the new statute a board of adjustment *shall* vary the provisions of the zoning ordinance if strict application of the ordinance would create unnecessary hardship. In order to obtain the variance, the applicant must show all of the following:

- Unnecessary hardship would result from the strict application of the ordinance
- The hardship results from conditions that are peculiar to the property
- The hardship is not a self-created hardship

Additionally, the applicant must show that the variance will

- Be consistent with the intent of the ordinance
- Secure public safety
- Achieve substantial justice

Finally, the statute prohibits any use variance.

To be sure, a variance is not a free pass from regulations or a tool to subvert the zoning ordinances. In order to obtain a variance, the applicant bears the burden of providing competent, substantial and relevant evidence to convince the decision-making board that the property meets all of the statutory standards for a variance. Merely showing some hardship is insufficient.

Let's consider each of the standards in more detail.

### Unnecessary Hardship from Strict Application

Whenever there is regulation, there is some level of necessary hardship and inconvenience shared by all of the community. An applicant for a variance must show *unnecessary* hardship. What is enough hardship? Unfortunately, there is no simple formula. It is determined on a case-by-case basis. That is why the board of adjustment holds a quasi-judicial hearing and considers the evidence presented.

The hardship must be more than mere inconvenience or a preference for a more lenient standard. Cost of compliance may be a factor, but cost is not determinative. It is not enough for an applicant to say that development will cost more in order to comply. The applicant must show the substantial and undue nature of that additional cost as compared to others

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subject to the same restriction.

Under the old statutes, many jurisdictions applied a standard that the applicant must show that there is no reasonable use of the property without a variance. Under current statutes, that stringent standard is no longer allowed. A property owner can prove unnecessary hardship, even if the owner has some reasonable use of the property without the variance.

### **Peculiar to the Property**

The unnecessary hardship must be peculiar to the property, not general to the neighborhood or community. Such peculiar characteristics might arise, for example, from location of the property, size or shape of the lot, or topography or water features on the site.

Imagine a lot that narrows dramatically toward the front yard and where the side yard setbacks prohibit the property owner from building an addition. The hardship (not being allowed to build an addition) flows from the strict application of the ordinance (the setback) and is peculiar to the property (because of the shape of the lot). A variance may be appropriate if the owner presents evidence to show she meets all of the standards.

By contrast, a variance is not the appropriate remedy for a condition or hardship that is shared by the neighborhood or the community as a whole. Consider that same narrowing lot. If all of the houses on the street shared that hardship, a variance would not be appropriate. Such conditions should be addressed through an ordinance amendment.

Hardships that result from personal circumstances may not be the basis for granting a variance. The board is looking at the nature of the property and the land use ordinances, not the nature of the applicant and their circumstances. Bringing an elderly parent to live with the family, for example, is a change in personal circumstance, not a condition peculiar to the property.

The reverse is also true. An applicant's personal circumstances cannot be the basis for denying a variance. The board should consider the property, not the applicant's bank account and ability to cover the cost of the hardship. Moreover, the fact that the applicant owns property nearby is irrelevant to the consideration of whether this particular property deserves a variance (*Williams v. N.C. Dept. of Env. & Nat. Resources*, 144 N.C. App 479, 548 S.E. 2d 793 (2001))

### **Not Self-Created Hardship**

You can't shoot yourself in the foot and then ask for a variance. The hardship must not result from actions taken by the applicant or property owner.

So what is self-created? Suppose a property owner sells part of a conforming lot and makes the remainder of the lot nonconforming. The hardship (limitations on the non-conforming lot) was self-created (by the owner selling the sliver off the parcel). The owner may not seek a variance for building on the substandard lot. Similarly, where an owner failed to seek zoning and building permits and then incorrectly placed foundation footings in the setback, the hardship is self-created. No variance is allowed. Ignorance of the law is no excuse.

What if the owner relied in good faith on seemingly valid surveys and obtained building permits? After construction began, a neighbor objected, citing a new survey and arguing that the foundation wall is within the setback. Is the owner's hardship self-imposed? Our North Carolina courts have held that hardships resulting from such good faith reliance on surveys and permits are eligible for a variance (*Turik v. Town of Surf City*, 182 N.C. App. 427, 642 S.E.2d 251 (2007)).

An important statutory provision applies here: "The act of purchasing property with knowledge that circumstances exist that may justify the granting of a variance shall not be regarded as a self-created hardship." For example, if the original owner had a legitimate case for a variance, someone buying the lot from that owner would have the same legal position as the original owner. They could seek a variance. This rule aligns with the broader zoning concept that land-use permissions run with the land, and land-use decisions are based on the property and impacts of development, not based on the particular owner. Is this a loophole for an unscrupulous owner to overcome the limit on variances for self-created hardship by selling the property to a spouse or sham LLC? Maybe, but the requirement for substantial justice (discussed below) probably protects from someone gaming the system.

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Restrictive covenants and other legal limitations *may* be a factor in determining hardship. Consider a property that has limited development ability due to a privately-imposed covenant for a street setback and a publicly-imposed stream setback. Can the owner seek a variance from the public stream setback? The NC Court of Appeals—interpreting a specific local ordinance—found that the board should consider physical *and* legal conditions of the property, including restrictive covenants (*Chapel Hill Title & Abstract Co., Inc. v. Town of Chapel Hill*, 362 N.C. 649, 669 S.E.2d 286 (2008)).

Let me emphasize that covenants and other legal limitations *may* be a factor. In that case, the decision was based on the local ordinance, and the decision pre-dated the statutory variance standards. A self-imposed legal limitation—like an easement across a property that limits buildable area—that was created after a zoning ordinance limitation became effective, could be viewed as a self-imposed hardship so that no variance should be granted.

### **Ordinance Purpose, Public Safety, and Substantial Justice**

In addition to those standards for “unnecessary hardship,” the statutory standard for granting a variance requires the applicant to show that “[t]he requested variance is consistent with the spirit, purpose, and intent of the ordinance, such that public safety is secured, and substantial justice is achieved.”

Where an ordinance expresses a clear intent, a variance cannot subvert that intent. But, alternatively, a variance may help to give effect to the ordinance intent. In one North Carolina case, an applicant was seeking a variance to allow an additional sign at a secondary entrance. Among other things, the ordinance purpose was to provide “adequate and effective signage,” “prevent driver confusion,” and “allow for flexibility to meet individual needs for business identification.” The purpose, the court found, called for the flexibility that the applicant sought, and the variance was allowed. (*Premier Plastic Surgery Ctr., PLLC v. Bd. of Adjustment for Town of Matthews*, 213 N.C. App. 364, 369, 713 S.E.2d 511, 515 (2011)).

The applicant also must show that the variance does not harm public safety. Even if an applicant met the standard for unnecessary hardship, a variance may be denied for public safety concerns. A property owner may prove an unnecessary hardship exists from limitations on on-site drives and parking for a commercial use. But, if neighbors presented expert evidence that the increased traffic and stormwater effects will harm public safety, the board may be justified in denying the variance.

Additionally, the statute requires the applicant to show that through the variance “substantial justice is achieved.” The concept of substantial justice raises issue of fairness for the community and neighbors. This concept echoes the requirement that hardship must be peculiar to the property—not shared by the community. If everyone bears this hardship, then one lucky person should not be relieved through a variance. Similarly, the justice standard draws upon a notion of precedence. Suppose Joe sought a variance last year and was denied. If Karl is seeking variance this year that is essentially the same request for a similar property, then the variance outcome should be the same.

The substantial justice standard also can play in favor of the applicant. If an applicant relies in good faith on a city permit, and that permit turned out to be wrongly issued, the applicant would have no vested rights in that mistakenly issued permit. Substantial justice might argue for allowing a variance for the applicant.

### **No Use Variance**

North Carolina courts long ago established that use variances are not permitted, and that rule is now part of the statutory standards. If a land use is not permitted on the property, a variance cannot be used to, in effect, amend the ordinance and allow the use. If only single family residences are permitted in a district, a variance cannot permit a duplex (*Sherrill v. Town of Wrightsville Beach*, 76 N.C. App. 646, 334 S.E.2d 103 (1985)).

If the use is already permitted on the property, a variance to allow the expansion of the permitted use is permissible. So, for example, if a sign is permitted for a commercial property, a variance to permit an additional sign is allowable. It is an area variance, not a use variance. (*Premier Plastic Surgery Ctr., PLLC v. Bd. of Adjustment for Town of Matthews*, 213 N.C. App. 364, 369, 713 S.E.2d 511 (2011)).

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## Conclusion

Making decisions about variances is a hard job. How much hardship is enough hardship? Is justice being served? Does the variance preserve the spirit of the ordinance? Rarely are there clear answers for these questions. Seeking those answers is the hard task of the board of adjustment. The applicant must present competent, material, and substantial evidence that they meet all of the standards. And the board must consider the issues on a case-by-case basis; they must weigh the evidence, apply the required statutory standards, and decide if a variance is warranted.

## Links

- [www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160A-388](http://www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160A-388)

## **Attachment F**



**Rear Yard**



**Right Side**



## **Attachment G**