

Town of Dallas Board of Adjustment Meeting
Agenda
Thursday, April 15, 2021
To be held at the Fire Station Community Room at 6:30 pm

The Following Agenda is proposed:

1. Call to Order
2. Roll Call of Member Present; Declaring a quorum as present
3. Invocation or Moment of Silence
4. Pledge of Allegiance to the Flag
5. Announcements/Introductions
6. Approval of Agenda with Additions or Deletions
7. Approval of Minutes – February 13, 2020
8. New Business
 - a. Public Hearing: Variance V2021-01
9. Adjournment

Minutes
Town of Dallas
Board of Adjustment
Meeting of February 13, 2020

The meeting was called to order at 6:30 pm by Chairman Curtis Wilson

The following members were present: Curtis Wilson – Chair, Glenn Bratton – Co-Chair, Tim Farris, Gene Brown, Reid Simms, and David Jones

Also present: Tiffany Faro – Development Services Director, Johnny Denton – Town Engineer, Richard and Lynette Williams – Applicants

There was an invocation led by Chairman Wilson and Pledge of Allegiance

Approval of Agenda: A motion was made by Tim Farris to approve the agenda for this meeting, seconded by Glenn Bratton, and approved by all.

Approval of Minutes: A motion was made by Tim Farris to approve the minutes for May 16, 2019, seconded by Glenn Bratton, and approved by all.

New Business:

A) Conditional Use Permit: 306 W Main Street

Board of Adjustment Members acknowledged that no conflict of interest existed. Staff introduced the agenda item and reminded all parties that this discussion required the Board of Adjustment to enter into a public hearing. A motion was made by Tim Farris to enter a public hearing, seconded by Glenn Bratton, and approved by all. All members present (other than Board of Adjustment) were sworn in by Chairman Wilson. Testimony was given on the application. A bathtub was added to the existing half bath. The space would be accessed through a garage door entrance. All guests are to be covered under liability coverage. The driveway is 120 feet long. The space was also to include a fire ladder, extinguisher, and Carbon Monoxide detector. The following findings were made:

- 1) That the proposed “tourist home” will not materially endanger the public health or safety if located where proposed and developed according to the plan submitted;
Motion made based on four conditions of approval, by Tim Farris, seconded by Glenn Bratton, and approved by all.
- 2) That the use will not create traffic hazards, excessive congestion, or hazards to pedestrians within the development and upon the public streets at the points of ingress and egress to such development;
Motion made by Reid Simms, seconded by David Jones, and approved by all.
- 3) That public facility systems are sufficient to serve the development;
Motion made by Glenn Bratton, seconded by David Jones, and approved by all.
- 4) That surrounding properties will be adequately protected from potential adverse effects of the development;

Motion made by Tim Farris, seconded by Glenn Bratton, and approved by all.

- 5) That the development complies with the standards and specifications for the corresponding general zoning districts; and

Motion made by Glenn Bratton, seconded by Tim Farris, and approved by all.

- 6) That the use is consistent with the general plan of development for the area.

Motion made by Glenn Bratton, seconded by Tim Farris, and approved by all.

A motion was made to exit the public hearing by Glenn Bratton, seconded by Tim Farris, and approved by all.

From the findings made, a Conditional Use Permit for 306 W Main Street was approved, subject to the following conditions:

1. An escape route plan shall be posted in the rental space and clearly visible.
2. A sign shall be placed at the window notifying guest of emergency exit and fire ladder.
3. Applicants shall coordinate with the Fire Chief for an annual pre-plan sketch of the space.
4. Applicant to demonstrate fire ladder in use in front of Fire Chief to ensure proper operation.

The motion of approval was made by Tim Farris, seconded by Glenn Bratton, and approved by all.

Other Business and Adjournment

Glenn Bratton made a motion to adjourn, which was seconded by David Jones, and approved by al.

Respectfully Submitted,

Nolan Groce, Development Services Director

Curtis Wilson, Chairman

**TOWN OF DALLAS BOARD OF ADJUSTMENT
OPENING STATEMENT**

To be read by the Chair at the start of the meeting.

“This hearing is a quasi-judicial evidentiary hearing. That means it is like a court hearing. State law sets specific procedures and rules concerning how this board must make its decisions. These rules are different from other types of land use decisions like rezoning cases.

This board’s discretion is limited. This board must base its decision on competent, relevant, and substantial evidence in the record. A quasi-judicial decision is not a popularity contest. It is a decision limited by standards based on the facts presented at this hearing. If you are speaking as a witness, please focus on the facts as standards, not personal preference or opinion.

This meeting is open to the public. Everyone is welcome to watch. Participation is limited. Only parties with Standing may participate by presenting evidence, calling witnesses and making legal arguments. Parties with Standing are limited to the applicant, local governments and persons who can show that they will suffer special damages.

Other individuals may serve as witnesses when called by the Board. Witness testimony is limited to facts, not opinions. For certain topics the Board is required to hear opinions on the impact on property values and increased traffic caused by the proposal. Individuals providing expert opinions must be qualified as experts and provide the factual evidence upon which they base their expert opinion.

Witnesses must swear or affirm their testimony. Witnesses must be recognized by the Chair, and begin their testimony with their name and address. The secretary will use the recording to make the minutes.

TOWN OF DALLAS, NORTH CAROLINA

REQUEST FOR BOARD ACTION

DESCRIPTION: Variance V2021-01

AGENDA ITEM NO. 8A

MEETING DATE: 4/15/2021

A. Summary

Marcus A. Potter, owner of 125 Gibson Ct., further known as Gaston County Parcel #214490, submitted a Zoning Variance Application on February 26, 2021, seeking relief from section 153.013 (D)7 Streets, curb and gutter, street lights.

Per the development standard, "All streets shall adhere to the most recently adopted version of the Town street and traffic standards policy." From this, Town engineer has sent the developer Industrial road standard detail. This requires 60' ROW and 15' of asphalt from center along with curb, gutter, and sidewalks (typical section included in packet). Based on the existing road width of approximately 20-22 feet, developer would have to widen the road along property frontage to meet the standard. Additional right-of-way would also be required along the western portion of the parcel, because the existing road was not built in the center of the existing 60' right-of-way.

The property is 6.91 acres and has approximately 693 linear feet of frontage along Gibson Court. Gibson Ct. is an NCDOT maintained road. The property is currently vacant.

Setbacks: Front 30 feet, Side 8 feet, Rear 20 feet

Variance standards have been provided in the Agenda packet for your review and reference.

This hearing has been advertised according to Statute and Ordinance requirements via: first class mail to abutting property owners, sign posted on the site, and in the Gaston Gazette on 4/2/2021 and 4/9/2021.

B. Variance Procedures

The quasi-judicial procedures are intended to protect the rights of applicants, landowners, & affected persons by providing procedures for appeals from decisions of administrative officials and variances from the provisions of Town Ordinance.

The Board of Adjustment does not have unlimited discretion in deciding whether to grant a variance. When unnecessary hardships would result from carrying out the strict letter of a zoning regulation, the Board of Adjustment shall vary any of the provisions of the zoning regulation upon a showing of all of the following:

1. Unnecessary hardship would result from the strict application of the regulation. It is not necessary to demonstrate that, in absence of the variance, no reasonable use can be made of the property.

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

3. The hardship did not result from actions taken by the applicant or the property owner. The act of purchasing property with knowledge that circumstances exist that may justify the granting of a variance is not a self-created hardship.

4. The requested variance is consistent with the spirit, purpose, and intent of the regulation, such that public safety is secured and substantial justice is achieved.

Note: The burden is on the applicant to provide sufficient evidence to show that the standards required for approval will be met. It is not the job of staff or the Board to produce this evidence. No change in permitted uses may be authorized by a variance. Appropriate conditions may be imposed on any variance, provided that the conditions are reasonable related to the variance. A concurring vote of four-fifths of all members of the Board of Adjustment is required in order to grant the variance. Decisions of the Board of Adjustment shall be appealed to the Gaston County Superior Court within 30 days of the Board final decision.

C. Staff Review of Required Findings:

1. The unnecessary hardship results from the strict application of the ordinance

Strict application of the ordinance would require the existing road to be widened to meet Town Industrial standard. The existing road was not built in the center of the 60' right of way, so additional right of way must be dedicated, mainly along western edge of property front. Some areas of frontage have enough existing right of way.

2. The unnecessary hardship results from conditions that are peculiar to the applicant's property

The hardship does not result from conditions that are peculiar to the applicant's property. The hardship is general to properties along Gibson Court. A variance is not the appropriate remedy for a condition or hardship that is shared by the neighborhood or public as a whole.

3. The unnecessary hardship is not a self-created hardship

The hardship is not a result of actions taken by the property owner. Gibson Court is an NCDOT road that has been in place many years prior to owners' acquisition of the parcel. Purchasing property with knowledge that circumstances exist that may justify the granting of a variance shall not be regarded as a self-created hardship.

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 neither consistent or inconsistent with the spirit, purpose, and intent of the ordinance.

BOARD ACTION TAKEN:



TOWN OF DALLAS

ZONING VARIANCE APPLICATION

Application No. V2021-01

Date: _____

To the Town of Dallas Board of Adjustment:

I, Marcus A. Potter, hereby request a variance to the requirements of Section 153.013(p)7 of the Dallas Zoning Ordinance for the following reason(s):

See below statement by Applicant for reasons for request of variance,

Street Address/location of the subject property: _____

Parcel ID #: 2144490

Current Zoning District: I-2 Current Use of the Property: Vacant

Property Owner: Marcus A. Potter

Address of the property owner: P.O. Box 45, Denver, NC 28037

Contact Telephone: (704) 655-2250 Email: marcus@narinc.net

Applicant: (same as above)

Applicant Address: _____

Applicant Contact Telephone: _____ email: _____

Relation to Property Owner: _____

Statement by applicant: (In the space provided, or on a separate sheet, state what reason(s) you have for the requested variance be granted.)

With the unique circumstances of the existing public road location inaccuracies and current utilities, the strict compliance with the ordinance provisions will result in the reduction of the useable area of the current tract by way of required additional public road r/w dedication. This reduces the reasonable return from that portion of the current parcel. In addition the resulting uneven pavement widths from compliance to the ordinance will increase the risk of traffic obstacles which conflict with public safety and welfare, and will not be in harmony with the existing industrial development. The owner will also bare the expense of existing public utility relocation with compliance to the development standards.

(over)

If the variance is granted, the overall design of the project will still comply with the intent of the design development standards of the ordinance. The resulting project will be arranged and constructed in a safe, orderly and visually harmonious manner and will reflect the overall character of the existing industrial subdivision and its surroundings.

TOWN OF DALLAS

ZONING VARIANCE APPLICATION

Please answer the following questions. Attach additional pages as needed.

- 1. Describe how complying with the literal terms of Chapter _____, Section _____ of the ordinance will prevent the applicant from securing a reasonable return from, or make reasonable use of, his property.

While complying with the literal terms of the ordinance, the owner will be required to dedicate additional R/W due to prior approved road construction inaccuracies. This will reduce the useable area of the current tract along with securing the reasonable return from that portion of property.

- 2. Does the hardship or practical difficulties of which the applicant cites would result from unique circumstances related to the applicant's land, such as natural features or topography?

The unique circumstance of the location of prior public road construction results in the hardship and practical difficulties of bearing the expense of existing public utility relocation along with additional dedication of public R/W from the parcel

- 3. Is the hardship a result of the applicant's own actions?

No, the hardship results from the previous road width design along with the construction and approvals of the existing road and utility locations.

- 4. If granted, will the variance request be in harmony with the general purpose and intent of the ordinance and preserve its spirit?

With the granted variance, the proposed plan design and general design standards of the ordinance will be arranged and constructed in a safe, orderly and visually harmonious manner and will reflect the basic character of the existing industrial subdivision and its surroundings.

- 5. If granted, will the variance request will secure the public safety and welfare and do substantial justice?

With the granted variance, the resulting consistent road width will eliminate the risk of potential traffic obstacles with uneven pavement width and secure the public safety and welfare and do substantial justice to the ordinance.

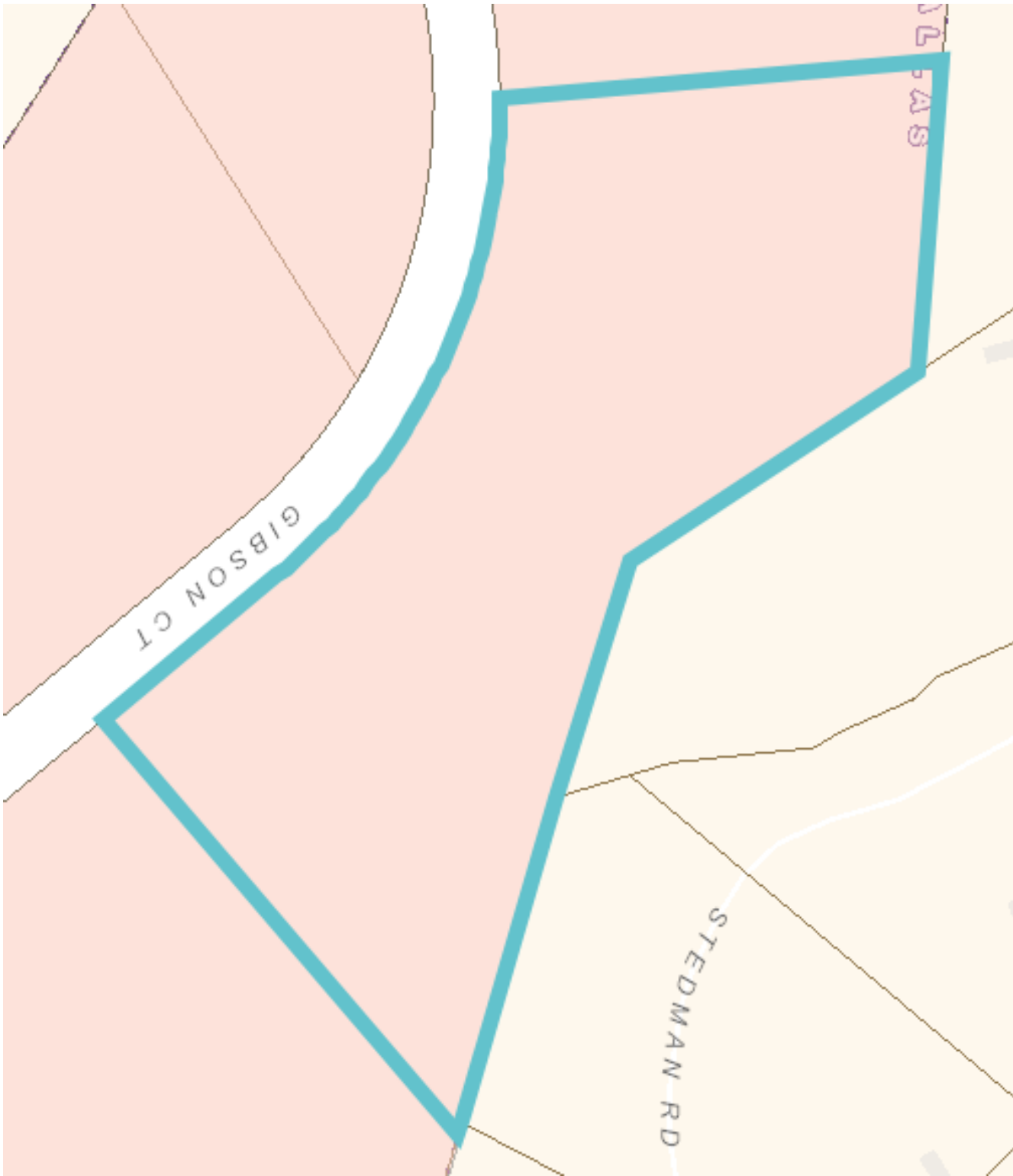
I certify that all the information presented by me in this application is accurate to the best of my knowledge, information and belief.


Signature of Applicant


Signature of Applicant

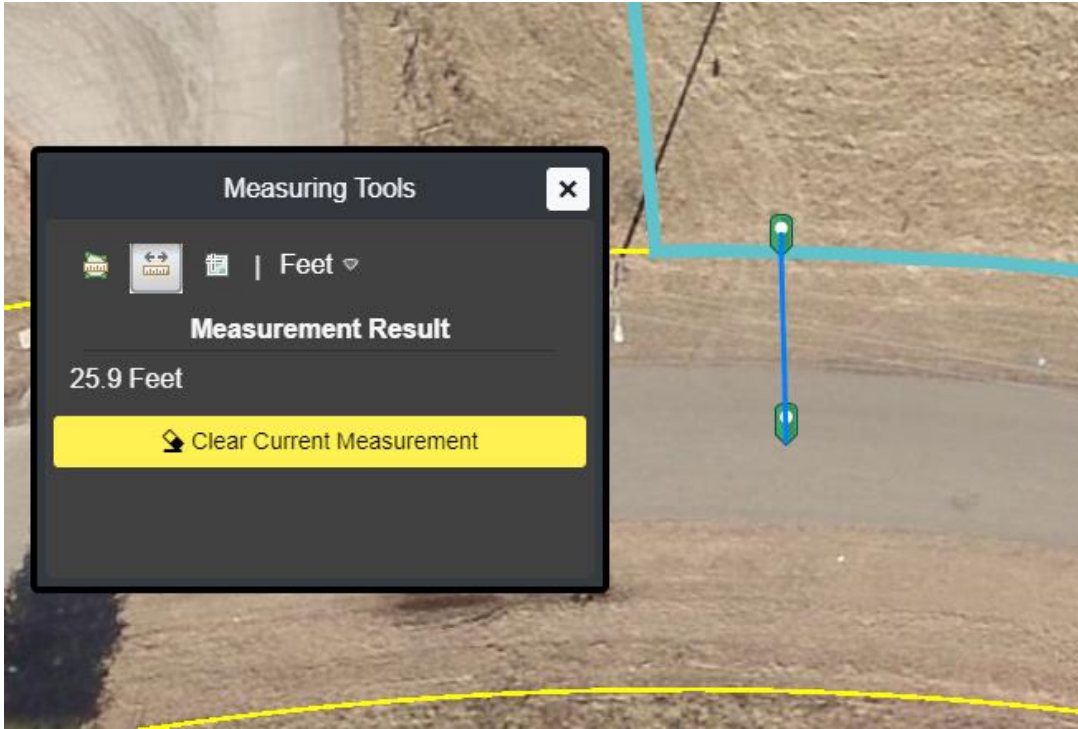
Submitted as completed, including the required \$300 fee, this _____ date of _____, 20____.

Staff: _____

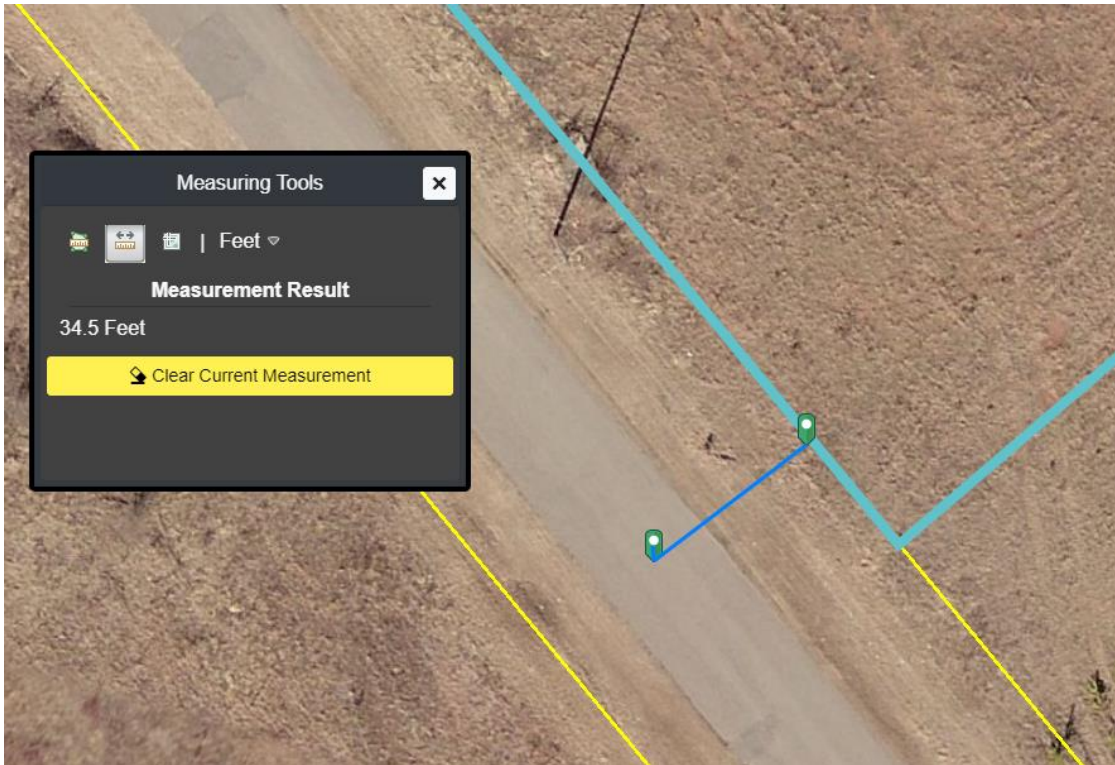




Western Corner



Eastern corner



§ 153.013 DEVELOPMENT STANDARDS.

(A) Intent.

(1) It is the intent of this section to provide general design standards for development in the town and its zoning jurisdiction to insure that such development will be arranged and constructed in a safe, orderly and visually harmonious manner and will reflect the basic character of the development site and its surroundings.

(2) New construction projects in any zoning district requiring a building permit, except single-family residential construction or residential accessory construction, are required to meet certain development standards to insure compatibility with surrounding land uses, provide for attractive, well-planned projects, and promote the public health, safety, and welfare of the town. All such construction projects must be approved prior to the start of construction by the Planning Staff, as established by §§ [153.100](#) through [153.102](#).

(3) If the Project Review Committee deems it impractical for a developer to comply with portions of this section, the Planning Staff shall have the authority to modify or elect not to apply portions of this section so long as the modification or deletion of a requirement does not constitute a variance.

(4) A site plan, once approved, must be resubmitted if construction has not commenced within one year of approval. Construction is deemed to have commenced if footers have been poured and approved.

(B) Applicability. Except as otherwise provided in this chapter, no land or structure shall be used or occupied and no excavation, removal of soil, clearing or placing of fill shall take place on land contemplated for development and no structural alteration of a building shall be constructed except in compliance with § [153.003](#) and the design standards contained within. Renovation or remodeling of a building meeting or exceeding one-half its current assessed value, not including land, shall comply with design standards outlined within this chapter.

(C) General site arrangement. Structures shall be placed and arranged so as not to adversely affect adjacent property. Adverse effects shall include, but not be limited to the creation of hazards, nuisances, danger or inconvenience, the unreasonable loss of light and air or solar access, or unreasonable loss of privacy.

(D) Development standards.

(1) *Area, yard, and height requirements.* The area, yard, and height requirements shall be the same as those established for each zoning district in [Appendix A](#): Yard and Height Requirements for Residential Districts and [Appendix B](#): Yard and Height Requirements for Business Districts.

(2) *Plans required.* Site plans are required before any decision can be rendered by the Project Review Committee (Planning/Zoning Staff). At least three copies of all required plans, drawings, and specifications shall be filed at the time of application. These plans and specifications shall furnish the following information.

(a) *Location and easements.* The applicant shall provide a boundary survey and vicinity map showing the property's total acreage, zoning classification (s), general location in relation to major streets, railroads, and/or waterways; date; north arrow; existing easements, reservations, and rights-of-way.

(b) *Suitability of land for development.* Plans shall include topographical features, streams, vegetation, soil types, flood prone areas, historic sites, and other features.

(3) *Timing of development.* The proposed schedule of development including phases or stages likely to be followed shall be submitted with all plans.

(4) *Water and sewer system.* Plans shall show the location of public water and sewer lines presently in existence, connections to these lines, manholes, pumping stations, fire hydrants, and other necessary features. All multi-family projects must have public water and sewer service or approved treatment facilities are required by the appropriate state or local authorities. Where a public water and/or sewer service is not reasonably available, individual water supply systems or subsurface sewage disposal systems may be permitted subject to approvals by the Gaston County Health Department.

(5) *Storm water drainage system.* A storm water drainage system is required and shall be submitted with the site plan(s). See § [153.014](#) for requirements.

(6) *Grading plan and sedimentation control measures.*

(a) Proposed grading plans and sedimentation control measures, as required by the this Code, shall be included with any petition.

(b) No development may be constructed or maintained so that such development unreasonably impedes the natural flow of water from higher adjacent properties across such development, thereby unreasonably causing considerable damage to such higher adjacent properties; concrete curb or curb and gutter is required to adequately direct and control storm water in all parking lots.

(7) *Streets, curb and gutter, street lights.* The proposed location and design of streets, curbs and gutters, and street lights, as required by the this Code, shall be included on the site plan(s). All streets shall adhere to the most recently adopted version of the town street and traffic standards policy.

(a) Combination vertical curbs and gutters shall be installed in accordance with town specifications in all subdivisions, except as follows:

1. "Valley type" curb and gutter may be requested if the road is a non-arterial local road as defined by NC Department of Transportation;

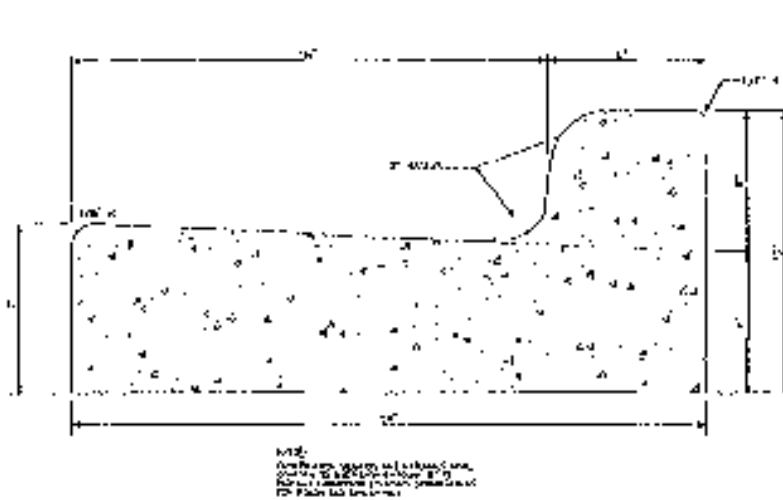
2. If the proposed subdivision is off a private unpaved road that accesses no greater than three lots, as allowed in division (A)(2) above, sewer and gutter on any portion of the road shall not be required;

3. If the subdivision fronts an existing street, the abutting portion of which does not contain curb and gutter, curb and gutter on the street may be waived by the

Planning Board or Town Board of Aldermen. If abutting portions of the street, however, do contain curb and gutter, the waiver shall not be allowed; and

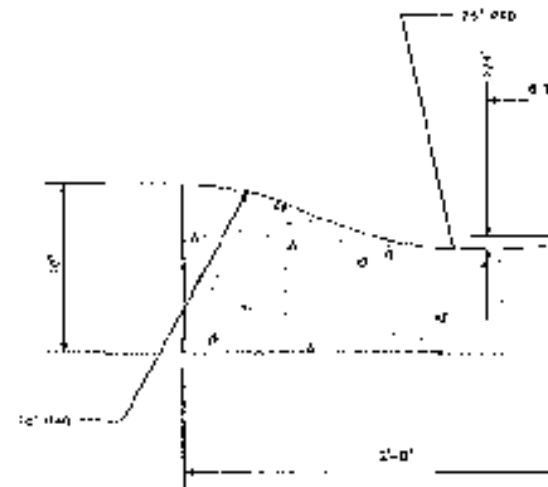
4. If a residential subdivision is located in the Watershed Protected Area, curbs and gutters are optional. The Watershed-IV Protected Area is shown on the official zoning map adopted by the Town Board of Aldermen, designating all areas located within this watershed.

(b) The diagrams below shall serve to illustrate curb and gutter requirements.



REVISED	DATE	BY	DESCRIPTION	PROJECT NO.	DATE
DRAWN BY: JED CHECKED BY: JED CITY ENGINEER: JED			STANDARD DETAIL 3 1/2" CURB AND 5" GUTTER	TOWN OF DALLAS PROJECT NO. 710-B	

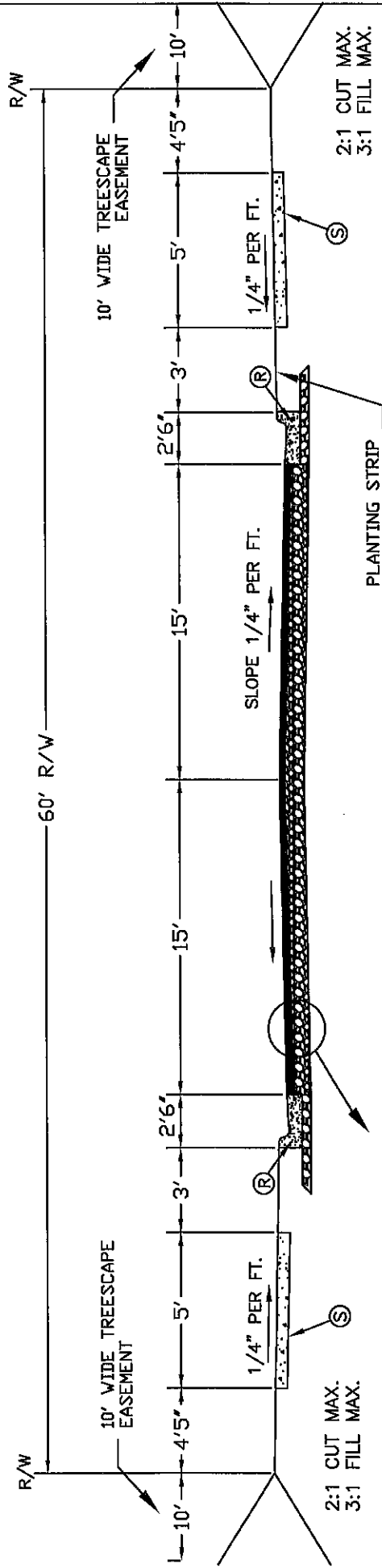
Figure 1 - 3-1/2" x 5" Vertical Curb/Gutter



REVISED	DATE	BY	DESCRIPTION	PROJECT NO.	DATE
DRAWN BY: JED CHECKED BY: JED CITY ENGINEER: JED			STANDARD DETAIL 24" VOLLEY CURB AND 4" GUTTER	TOWN OF DALLAS PROJECT NO. 710-B	

Figure 2 - 24" Volley Type Curb/Gutter

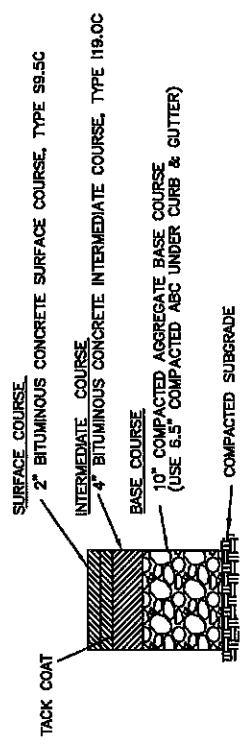
(on non-arterial local roads with appro



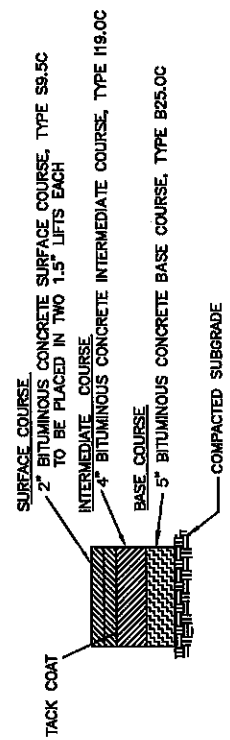
2:1 CUT MAX.
3:1 FILL MAX.

PLANTING STRIP
SEE NOTE 8

EITHER OF THESE PAVEMENT SECTIONS MAY BE USED:



TYPICAL PAVEMENT SECTION WITH STONE BASE



TYPICAL FULL-DEPTH ASPHALT PAVEMENT SECTION

NOTES:

1. USE OF VALLEY GUTTER IS PROHIBITED.
2. DEVELOPER MAY SUBMIT AN ALTERNATIVE PAVEMENT DESIGN TO CITY ENGINEER.
3. AN ALTERNATIVE PAVEMENT DESIGN MAY BE REQUIRED BY THE TOWN BASED ON SPECIFIC TRAFFIC PARAMETERS.
4. ZONING SETBACKS MEASURED FROM TOTAL R/W
5. PLANTING STRIP ADJACENT TO SIDEWALK SHALL BE GRADED TO 1/4" PER FOOT (MIN.) UP TO 1 1/4" PER FOOT (MAX.) EXCEPT WHERE EXCESSIVE NATURAL GRADES MAKE THIS REQUIREMENT IMPRACTICAL. IN SUCH CASES, THE CITY ENGINEER MAY AUTHORIZE A SUITABLE GRADE.

KEY

- (R) 2'-6" STANDARD CURB AND GUTTER
- (S) 4" CONCRETE SIDEWALK

NOT TO SCALE

TOWN OF DALLAS
LAND DEVELOPMENT STANDARDS
INCLUDES TOWN ETJ

LOCAL INDUSTRIAL STREET
TYPICAL SECTION

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

By Adam Lovelady

Article: <https://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

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 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.

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, 713 S.E.2d 511 (2011)).

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
- canons.sog.unc.edu/?p=7155