



## **Town of Mint Hill**

John M. McEwen Assembly Room  
4430 Mint Hill Village Lane  
Mint Hill, North Carolina 28227

### **Mint Hill Board of Adjustment Agenda**

February 27<sup>th</sup>, 2017 at 6:30 p.m.

1. Call To Order
2. Roll Call and Declaration of Quorum
3. Approve Minutes of October 24<sup>th</sup>, 2016 Regular Meeting
4. Reports of Committees, Members, and Staff
5. Old Business
6. New Business
  - A. Training on Variance Standards with a Webinar from UNC School of Government
7. Other Business
8. Adjournment

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Candice Everhart  
Program Support Assistant  
February 21<sup>st</sup>, 2017

**MINUTES OF THE MINT HILL BOARD OF ADJUSTMENT**  
**October 24<sup>th</sup>, 2016**

The Mint Hill Board of Adjustment met in regular session on Monday, October 24<sup>th</sup>, 2016 at 6:30 p.m. in the John M. McEwen Assembly Room, Mint Hill Town Hall.

**ATTENDANCE**

Chairman: Gary Isenhour  
Vice Chairman: June Hood  
Members: Michael Weslake, Ronald Rentschler and Bobby Reynolds  
ETJ Members: Debi Powell and David Tirey  
Town Planner: Chris Breedlove  
Clerk to the Board: Candice Everhart

**CALL TO ORDER**

Chairman Isenhour called the meeting to order at 6:30 p.m., declared a quorum present and the meeting duly constituted to carry on business.

**ORDER OF BUSINESS**

**Approval of Minutes of August 29<sup>th</sup>, 2016 Regular Meeting:** Upon the motion of Mr. Reynolds, seconded by Mr. Rentschler, the Board unanimously approved the minutes of the August 29<sup>th</sup>, 2016 Board of Adjustment regular meeting.

**Reports of Committees, Members and Staff:** Mr. Breedlove stated, the case V16-6 from August was denied. John and I found out they can get what they want without a variance. Basically with that road frontage we require two acres and those two parcels together do not meet that. There is a question about when those parcels were subdivided. They were subdivided back in the 30s or 40s which precedes the Town so they are good to go to recombine the setbacks that way. We have not forgotten about training. With the Holidays coming up we are looking into training for the new year when we do not have a case to hear.

**Old Business:** None.

**New Business:**

- A. Discussion and Decision on Variance Request #V16-7, Filed by Marcia Nembhard, for Property Located at 4914 Magglucci Place, Tax Parcel #135-374-12, from Section 6.1 Table 2: Dimensional Requirements of the Mint Hill Unified Development Ordinance.**

*Mr. Isenhour asked the applicant and Mr. Breedlove to step forward and be sworn in. Do you swear or affirm that the testimony you are about to give is to the best of your knowledge so help you God? I do, stated Mrs. Nembhard and Mr. Breedlove.*

Mr. Breedlove stated, the applicant was wanting to sell the home. The survey for a perspective buyer found this encroachment of the rear porch. Everything prior to this shows the permits for the porch by Mecklenburg County and everything was signed off.

*Mr. Isenhour asked, is it only four and a quarter feet? Mr. Breedlove said, yes.*

Mrs. Nembhard said, we purchased this house nine years ago and about seven months later we added the porch. As you can see in your packet all of our documents were filed and the original builder added on the porch. Fast-forward to now and my concern is we had a buyer and we got to the point of the closing and after they did the survey they saw we were encroaching. Only one corner is actually encroaching the four feet, it's not the whole way across. In order to try and expedite the sale of the house we tried many different channels. I went to Mecklenburg and said we had no violations. When I came here they said I had no violations on record. The lawyer suggested we go to our neighbor and see if we could swap off the property and they said no. We also offered to purchase part of the property and they said no. I'm asking you to look at this and consider it and give us five foot allowance so we don't have to cut down the porch.

*Mr. Isenhour asked, when was the survey taken? Mrs. Nembhard said, September 8, 2016.*

*Mr. Weslake asked, is this the original location of the porch that he sketched or was it changed? Mrs. Nembhard said, nothing was changed. The builder sketched everything and he took the permits to Mecklenburg County. As far as I know nothing was changed and this is what he submitted for permits.*

*Mr. Isenhour said, if there are no further questions for the applicant we will now go into our fact finding portion of the hearing. Our variance tonight is to decide on variance request #VI6-7, Filed by Marcia Nembhard, for property location at 4914 Magglucci Place, Tax Parcel #135-374-12, form Section 6.1 Table 2: Dimensional requirements of the Mint Hill Unified Development Ordinance.*

**Unnecessary hardships would result from the strict application of the ordinance.**

*Mr. Weslake said, yes the hardships result from not being able to sell the property.*

*Mr. Reynolds said, yes the hardships result by restricting her from selling.*

*Mrs. Hood said, I agree.*

*Mr. Isenhour said, I agree. Unnecessary hardships would result by her having to tear down the porch.*

*Mrs. Powell said, unnecessary hardships would result from the strict application of the ordinance based on the hardship being that she could not sell her property in the current condition without a variance.*

*Mr. Rentschler said, I agree with Mrs. Powell.*

*Mr. Tirey said, I agree with Mrs. Powell.*

**The hardship results from conditions that are peculiar to the property, such as location, size or topography.**

*Mr. Tirey said, no the hardship doesn't result from the property, but it results from the builder and permitting.*

*Mr. Rentschler said, I agree.*

*Mrs. Powell said, the hardship results from conditions that are peculiar to the property such as the location, size and topography. The fact that only the left corner encroaches on the property shows there is an issue with the layout.*

*Mr. Isenhour said, I agree with Mrs. Powell.*

*Mrs. Hood said, I agree with Mrs. Powell.*

*Mr. Reynolds said, yes due to the location of the new porch as it was added.*

*Mr. Weslake said, the hardship isn't a result of the property. The hardship is a result of the error of the contractor.*

**The hardship did not result from actions taken by the applicant or the property owner.**

*Mr. Weslake said, the hardship is not a result of the applicant. It occurred when the contractor placed the porch in the setback.*

*Mr. Reynolds said, it was not a result of the applicant but the contractor.*

*Mrs. Hood said, I agree.*

*Mr. Isenhour said, I agree.*

*Mrs. Powell said, the hardship did not result from actions taken by the applicant or property owner. The hardship was a result of the contractor and inspector.*

*Mr. Rentschler said, I agree with Mrs. Powell.*

*Mr. Tirey said, I agree with Mrs. Powell.*

**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.**

*Mr. Tirey said, yes the variance requested would be consistent. Everything was signed off and permitted.*

*Mr. Rentschler said, I agree.*

*Mrs. Powell said, 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 because the applicant was innocent of any wrongdoing and only a small portion of the porch encroaches into the setback area.*

*Mr. Isenhour said, I agree.*

*Mrs. Hood said, I agree.*

*Mr. Reynolds said, I agree.*

*Mr. Weslake said, I agree.*

**Mrs. Powell said, in regards to Variance Request #V16-7, filed by Marcia Nembhard, for property located at 4914 Magglucci Place, Tax Parcel Number 135-374-12; requesting a variance to Section 6.1 Table 2: Dimensional Requirements; to reduce the minimum forty foot rear setback by five feet; I make a motion to approve this variance for the following reasons: Unnecessary hardships would result from the**

**strict application of the Ordinance in that without a variance, the property is not sellable. The hardship results from conditions that are peculiar to the property, as well as did not result from actions taken by the applicant in that the hardship results from the combination of the slope of the land and mistakes made by the builders and inspectors. Because the applicant was innocent of any wrongdoing and only a small portion of the back porch encroaches into the rear setback line a variance would be consistent with the spirit, purpose and intent of the ordinance, and public safety would remain secure. Mr. Reynolds seconded the motion and the Board unanimously agreed.**

**Other Business:** None

**Adjournment:** Upon the motion of Mr. Isenhour, seconded by Mr. Rentschler, and unanimously agreed upon, Chairman Isenhour adjourned the meeting at 6:52 p.m.

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Candice Everhart  
Program Support Assistant

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