

**TOWN OF CARY
ZONING BOARD OF ADJUSTMENT HEARING
March 2, 2015**

VARIANCE WORKSHEET

IN THE MATTER OF:

CASE NO. 15-V-01

TOWN OF CARY

STATE OF NORTH CAROLINA

APPLICANT NAME:

Alastair and Alison McEwan

ADDRESS OF SUBJECT PROPERTY:

500 Hogan's Valley Way
Cary, NC 27513

PROPERTY OWNER NAMES/ADDRESS:

Same as above

STAFF REPRESENTATIVE:

Contact: Debra Grannan, Senior Planner
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PRESENT ZONING/SETBACKS:

Zoning: Planned Development District (PDD) Major
Front (Roadway): 20'
Rear: 20'
Side: 15' Aggregate, 5' Minimum
Corner Side: 15'
Accessory Structure: 5'

VICINITY MAP

REQUEST: A variance from Land Development Ordinance Section 6.3 to allow a patio/pool decking area associated with an existing swimming pool and retaining wall to encroach into the required five-foot side yard setback.

THE VARIANCE PROCESS is intended to provide limited relief from the LDO in those cases where strict application of a particular requirement will create unnecessary hardship. Variances are not intended, and should not be used, to remove inconveniences or financial burdens that the requirements of the LDO may impose on property owners in general. Instead, a variance is intended to be used to provide relief where a hardship results from conditions peculiar to the

property itself. Neither state nor federal laws or requirements may be varied by the Town. [3.20.1]

The following standards are eligible for a variance [3.20.2]:

- Any of the development or zoning district standards listed in Table 3.19-1 or any building encroachment into a required setback, but only when the Minor Modification procedures in Section 3.19 are unable to address the hardship; and,
- Any other provision of the LDO, so long as the LDO does not provide a mechanism for modification or waiver of the provision, and the requested variance would not constitute a use variance.

The board may not grant a variance to allow a use expressly, or by implication, prohibited under the LDO for the zoning district containing the property for which the variance is sought [3.20.4(E)]. The board may not grant a variance from any written conditions attached by the council to its approval of a Special Use, subdivision plat or site plan, conditional use district, or aspect of an approved planned development master plan [3.20.4(F)]. There may be no variance from the Overlay District regulations unless specifically permitted in Section 4.4. There may be no variance that modifies the thoroughfare buffer or vegetation [4.4.4(E)].

EXHIBITS

[Exhibit A](#): Application for Variance

[Exhibit B](#): Book of Maps 1993, Page 0009

[Exhibit C](#): Building Permit (swimming pool) Permit 06-5260

[Exhibit D](#): LDO Section 6.3-1 Projections Permitted into Required Setbacks

[Exhibit E](#): Recombination Plat Book of Maps 2015, Page 33

[Exhibit F](#): Aerial Image of Hogans Valley Way and Hilsdorf Court

[Exhibit G](#): Photo of Retaining Wall

[Exhibit H](#): Preston Community Association Approval

BACKGROUND:

1. The application for a variance was filed by all the property owners for the land affected by the variance ([Exhibit A](#)).
2. The applicant's attorney took part in the pre-application conference on October 29, 2013 as required by LDO Section 3.20.3 (B).
3. The property is described as follows:

Site Address: 500 Hogan's Valley Way, Cary, NC 27513

PIN: # 0744897114

Lot: 725

Subdivision: Preston Plantation

Total Lot Size: 0.50

Current Zoning District: Planned Development District (PDD) Major

4. The subject lot was platted as part of a subdivision recorded in Book of Maps 1993, Page 0009 ([Exhibit B](#)).
5. The property is improved with a detached, residential dwelling.

6. A building permit to construct a swimming pool was issued by the Town of Cary in 2006 ([Exhibit C](#)).
7. Per Section 6.3.2 and Table 6.3-1 of the LDO ([Exhibit D](#)), patios and similar features are required to be no closer than five (5) feet to the property line.
8. When constructed, the decking associated with the pool encroached onto the adjacent lot. The subject lot (725) was recombined with a portion of the adjacent lot (724) in 2015 and recorded in Wake County Book of Maps 2015 Page 0003 ([Exhibit E](#)). This recombination corrected the encroachment over the property line; however, a portion of the pool decking and retaining wall are only 1.48 feet from the new property line.
9. Since the encroachment exceeds 10% of the required setbacks, the Director's Modification procedures in section 3.19 of the Land Development Ordinance were unable to address the hardship.
10. There are no specific zoning conditions or conditions that are part of a special use permit or a Planned Development District (PDD) approval that will be varied by this request.
11. The application and other records pertaining to the variance request are part of the record.
12. Notice has been provided as required by law.

The board may approve the Variance only if it finds that all of the criteria below have been met:

3.20.5 Approval Criteria

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

The applicant provided the following information regarding these criteria:

Applicant Position: The retaining wall for the patio and pool has already been constructed. Less than 15 square feet of the patio area encroaches. The patio deck is not visible from the adjacent property. Eliminating the encroachment would require tearing down the patio and related fixtures at significant expense.

Staff Comments: The pool, retaining wall, and patio were constructed in 2007. The retaining wall blocks the view of the pool decking from ground level. ([Exhibit G](#)).

(B) 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 hardship resulting from conditions that are common to the neighborhood or the general public, may not be the basis for granting a variance.

The applicant provided the following information regarding these criteria:

Applicant's Position: The configuration of the property will not allow sufficient space to rebuild the retaining wall and deck five feet from the lot line. The property owner has obtained from the neighboring owner all of the land that is available to correct the problem and has effected a recombination of the two lots, but the lot line could not be moved far enough to eliminate the encroachment.

Staff Comments: The subject property was recombined with the adjacent lot, thus removing the pool decking encroachment over the property line; however, the patio/decking area remains only 1.48 feet from the property line. The lot has road frontage on two public streets and the principal dwelling was setback greater than the required 20-feet from both front property lines. This resulted with a placement on the property that was more consistent with other homes in the vicinity ([Exhibit F](#)), but also reduced the buildable area in the rear yard.

(C) *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 shall not be regarded as a self-created hardship.*

The applicant provided the following information regarding these criteria:

Applicant's Position: The encroachment into the setback was created by an error by a pool contractor that is now out of business and cannot be found. The error was not discovered until a surveyor for the neighboring owner discovered the encroachment. The adjoining owner has cooperated in minimizing the encroachment. The Preston Community approved the plans for the pool and patio. ([Exhibit H](#)). The pool, with retaining walls and pool deck, has been in place since July 2006 without complaint from neighbors.

Staff Comments: The Town of Cary Inspections and Permits Department issued a permit for the swimming pool in 2006. There was no record of a survey with the permit files. The setback encroachment was brought to the town's attention by the property owners in 2013.

(D) *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 applicant provided the following information regarding these criteria:

Applicant's Position: There will be no impact on public safety. The Ordinance already allows the retaining wall, which meets setbacks. There is only a portion of the patio that encroaches (less than 15 square feet) because the patio sits on top of the compliant retaining wall.

Staff Comments: Walls and fences are not subject to a 5-foot setback from property lines. The portion of the pool decking (patio) area that encroaches is relatively small. There are no impacts to utility lines or easements.

SUGGESTED MOTIONS

MOTION TO GRANT VARIANCE

For the reasons discussed, I move that we GRANT the variance as it meets all the approval criteria in section 3.20.5 of the Land Development Ordinance.

OR

MOTION TO GRANT VARIANCE WITH CONDITIONS

For the reasons discussed, I move that we GRANT the variance with the following conditions deemed necessary and appropriate to satisfy the approval criteria of section 3.20.5 of the Land Development Ordinance:

1. *[insert conditions]*
- 2.

OR

MOTION TO DENY VARIANCE

For the reasons discussed, I move that we deny the variance request as it does not meet all of the approval criteria set out in Section 3.20.5, specifically, *[indicate the reason why the request does not meet the approval criteria]*:

(Note: Based on the action taken by the Board of Adjustment, staff will prepare a Resolution to be presented to the board at a future meeting for ratification.)