



North Carolina Department of Environment and Natural Resources

Division of Water Quality

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**Request for an After-the-Fact Major Variance from the  
Neuse River Riparian Area Protection Rules**

**HJ Morris Construction, Inc.  
8103 Dreamy Way  
Raleigh, NC**

**July 10, 2013**

HJ Morris Construction, Inc. has requested the Water Quality Committee (WQC) to grant an after-the-fact Major Variance from the Neuse Riparian Area Protection Rules (15A NCAC 02B .0233) for a single family residence constructed at 8103 Dreamy Way in Raleigh, NC. The residence has impacted 471 square feet of Zone 1 and 1,017 square feet of Zone 2.

In May 2013, the WQC postponed a final decision in order to give DWQ staff and the applicant the opportunity to prepare a stronger stormwater management plan and restrictive covenant whereby water quality will be better protected.

Accordingly, pursuant to 15A NCAC 02B .0233 (9)(c), the Division of Water Quality makes the preliminary finding that the major variance request demonstrates the following:

- Practical difficulties or unnecessary hardships are present;
- The harmony and spirit of buffer protection requirements are met; and
- The protection of water quality and substantial justice has been achieved as required in 15A NCAC 02B .0233 (9)(a).

**15A NCAC 02B .0233 (9)(a)(i) states the following:**

*“There are practical difficulties or unnecessary hardships that prevent compliance with the strict letter of the riparian buffer protection requirements. Practical difficulties or unnecessary hardships shall be evaluated in accordance with the following:*

- A. If the applicant complies with the provisions of this Rule, he/she can secure no reasonable return from, nor make reasonable use of, his/her property. Merely proving that the variance would permit a greater profit from the property shall not be considered adequate justification for a variance. Moreover, the Division or delegated local authority shall consider whether the variance is the minimum possible deviation from the terms of this Rule that shall make reasonable use of the property possible.*

- B. *The hardship results from application of this Rule to the property rather than from other factors such as deed restrictions or other hardship.*
- C. *The hardship is due to the physical nature of the applicant's property, such as its size, shape, or topography, which is different from that of neighboring property.*
- D. *The applicant did not cause the hardship by knowingly or unknowingly violating this Rule.*
- E. *The applicant did not purchase the property after the effective date of this Rule, and then request an appeal.*
- F. *The hardship is unique to the applicant's property, rather than the result of conditions that are widespread. If other properties are equally subject to the hardship created in the restriction, then granting a variance would be a special privilege denied to others, and would not promote equal justice;"*

The Division finds the following:

There are practical difficulties that prevent compliance with the strict letter of the riparian buffer protection requirements:

- A. The applicant cannot make reasonable use of the property without impacting the protected riparian buffer. This is a small, narrow, irregularly shaped lot. In order to construct a home of similar size to other homes within the subdivision, some impact to the protected riparian buffer would be required. However, the house could have been designed to avoid or further minimize impacts to Zone 1 of the protected riparian buffer. Unfortunately, the applicant was unaware of the Riparian Buffer Rules.
- B. The hardship results both from the application of this rule and other factors. In addition to the protected riparian buffer and the lot configuration, this lot is further constricted by the City of Raleigh setbacks from the front, back and sides of the lot.
- C. The hardship is due to the physical nature of the applicant's property. This is a small, narrow, irregularly shaped lot with protected riparian buffer encompassing the majority of the lot. These constraints are different from that of most of the properties in the subdivision.
- D. The applicant did cause the hardship by unknowingly violating this Rule. The applicant purchased the property on October 1, 2012 and began construction after receiving a building permit from the City of Raleigh. The plat recorded in 2002 and again in 2006 did not show a protected riparian buffer. The Division of Water Quality conducted a site inspection on January 8, 2013 and found a house under construction within Zones 1 and 2 of the protected riparian buffer. The Division sent a Notice of Violation (NOV) on January 16, 2013. On February 20, the Division received a response to the NOV indicating that a consultant had been authorized to begin preparing an after-the-fact Major Variance application. On April 19, the Division received the application.
- E. The applicant purchased the property on October 1, 2012, which is after the effective date of this Rule.
- F. The hardship is unique to the applicant's property. The 2006 recorded plat does not depict a protected riparian buffer, the City of Raleigh issued a building permit for the

house in its current location, and the house has already been constructed within the protected riparian buffer.

**15A NCAC 02B .0233 (9)(a)(ii)**

*“The variance is in harmony with the general purpose and intent of the State’s riparian buffer protection requirements and preserves its spirit;”*

The Divisions finds the following:

The purpose of the riparian buffer rules is to protect existing riparian buffer areas. It could be argued that the house could have been designed to avoid or further minimize impacts to Zone 1 of the protected riparian buffer. Unfortunately, applicant’s deed review efforts and the City of Raleigh’s building permit/review process failed to reveal presence of a stream and riparian buffers. The applicant was unaware of the presences of riparian buffers on the lot at the time of purchase. Accordingly, no initial efforts were made to avoid or minimize impacts to the protected riparian buffer.

However, the applicant is proposing to: 1) purchase 2,938.5 buffer mitigation credits, 2) provide a nutrient offset payment, 3) redirect house gutters such that they outlet onto dissipaters pads and are directed to locations outside of the riparian buffers, 4) construct a bio-retention area, 5) provide plantings along the stream, and 6) place a restrictive covenant on the lot. This restrictive covenant will ensure that the filling, draining, creation of concentrated stormwater flow, or impacts to riparian buffer (streamside) vegetation; and alterations of the rain gutters, outlet dissipater pad, streamside plantings, and a bio-retention areas do not occur. (Note: restrictive covenant language has been reviewed by DWQ staff and Attorney General’s office)

**15A NCAC 02B .0233 (9)(a)(iii)**

*“In granting the variance, the public safety and welfare have been assured, water quality has been protected, and substantial justice has been done.”*

The Divisions finds the following:

In granting the variance, water quality has been protected and substantial justice has been done.

The applicant is proposing: 1) purchase 2,938.5 buffer mitigation credits, 2) provide a nutrient offset payment, 3) redirect house gutters such that they outlet onto dissipaters pads and are directed to locations outside of the riparian buffers, 4) construct a bio-retention area, 5) provide plantings along the stream, and 6) place a restrictive covenant on the lot. This restrictive covenant will ensure that the filling, draining, creation of concentrated stormwater flow, or impacts to riparian buffer (streamside) vegetation; and alterations of the rain gutters, outlet dissipater pad, streamside planting, and a bio-retention areas do not occur.

This Major Variance as proposed is consistent from past Major Variance approvals from the Water Quality Committee.

**Division of Water Quality's Recommendation:**

Based on the information submitted, the Division of Water Quality supports this request for a Major Variance from the Neuse Riparian Area Protection Rules because practical difficulties or unnecessary hardships are present; the harmony and spirit of buffer protection requirements are met; and the protection of water quality and substantial justice has been achieved as required in 15A NCAC 02B .0233 (9)(a) provided the below mentioned conditions or stipulation are required. If the Water Quality Committee approves this request for a Major Variance from the Neuse Riparian Area Protection Rules, the Division recommends approval with the following conditions or stipulations [pursuant to 15A NCAC 02B .0233 (9)(c)(ii)]:

- **Mitigation.** The applicant shall provide mitigation for the proposed impacts by purchasing 2,938.5 buffer credits from EBX-EM, LLC as indicated in their application.
- **Nutrient Offset.** The applicant is to provide a nutrient offset payment.
- **Stormwater Management Plan.**
  - construct a bio-retention area (The bioretention area will provide treatment for 465 square feet of impervious surface to offset the approximately 335 square feet of impervious surfaces that drains to riparian buffer.)
  - redirect all remaining house gutters such that they outlet onto dissipaters pads and are directed to locations outside of the riparian buffers,
  - provide plantings along the stream,
- **Protective Covenants:**
  - place a restrictive covenant on the lot to ensure that the filling, draining, creation of concentrated stormwater flow, or impacts to riparian buffer (streamside) vegetation; and alterations of the rain gutters, outlet dissipater pad, streamside planting, and a bio-retention areas do not occur.
  - states that the stream and protected Neuse River Riparian Buffer exists on the property.
  - stipulates that the direct discharge of stormwater runoff through the buffer to the stream is prohibited.
  - requires that gutters, outlet dissipater pad, stream side plantings, and bio-retention area remain in place and be utilized and maintained on a regular basis. The Division of Water Quality is to be notified in writing of any proposal to remove or modify the above stormwater control measures.