



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**

May 8, 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.

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 requesting 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, that 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 variance is not in harmony with the general purpose and intent of the State’s riparian buffer protection requirements and does not preserve its spirit. The purpose of the riparian buffer rules is to protect existing riparian buffer areas. 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, the applicant was unaware of the Riparian Buffer Rules at the time of purchase, conducted a deed review, and after receipt of a City of Raleigh building permit. Accordingly, no efforts were made to avoid or minimize impacts to the protected riparian buffer.

However, the applicant is proposing to: 1) purchase buffer mitigation credits to address the footprint of the impacts; 2) install gutters and rain barrels to manage stormwater; 3) purchase nutrient offset payments; and 4) place a covenant on the lot to ensure rain barrels remain for the intended use, direct discharge of stormwater runoff through the buffer to the stream is prohibited and to ensure protection of the existing riparian buffer.

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 buffer mitigation credits to address the footprint of the impacts; 2) install gutters and rain barrels to manage stormwater, 3) purchase nutrient offset payments, and 4) place a covenant on the lot to ensure rain barrels remain for the intended use, direct discharge of stormwater runoff through the buffer to the stream is prohibited and to ensure protection of the existing riparian buffer.

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.
- **Stormwater Management Plan.**
 - Installation of gutters and rain barrels to manage stormwater
 - purchase nutrient offset payments
- **Protective Covenants:**
 - The stream and protected Neuse River Riparian Buffer exists on the property.
 - Direct discharge of stormwater runoff through the buffer to the stream is prohibited.
 - Gutters and rain barrels have been provided on the house to help ensure that such discharge does not occur. These rain barrels shall remain in place and be utilized and maintained on a regular basis.
 - The Division of Water Quality should be notified of any proposal to remove or modify the rain barrels
 - This covenant is intended to ensure continued compliance with all rules adopted by the State of North Carolina and therefore the State of North Carolina may enforce benefits.