



**Minutes
Regular Board of Adjustment Meeting
August 10, 2021 - 6:30 PM**

Meeting Location:

Town Hall

101 Huntersville-Concord Road

Huntersville NC 28078

1. Roll Call, Determination of Quorum

Quorum was determined, and Chairman Cecil called the meeting to order.

Regular Members in attendance: Chairman E. Cecil, Vice-Chairman P. Jacobson, S. Genenbacher, J. Bradshaw, J. Loucks, M. Bennett, and K. Burton.

Alternate Members present: K. Bray, J. Carbonell, and J. Passarelli

2. Approval of Minutes

2.A. Consider approval of the July 13, 2021 Minutes of the Meeting

J. Bradshaw made a Motion to Approve the July 13, 2021 Minutes of the Meeting. J. Loucks seconded the motion. The motion passed unanimously (7-0).

Chairman Cecil read the conflict of interest disclosure statement and asked all Board members if there was any conflict. There was no conflict stated.

3. Hearing of Cases

Prior to testimony, a group attestation was completed for all parties involved or giving testimony to the case. This included: Lauren Speight, Planner 1; Brad Priest, Principal Planner; Austin Watts 200 S Tryon Street, #200 Charlotte NC.

Chairman Cecil asked Staff if V21-07, V21-08 and V21-09 had complete applications. Staff responded that they did not. The Chairman asked the applicant if they would like to continue their items so as to submit a complete application. There was no objection.

J. Bradshaw made a Motion to Continue V21-07, V21-08, and V21-09 to September regular meeting or until a complete an application is submitted. P. Jacobson seconded the motion. The motion passed unanimously (7-0)

3.A. Variance 21-05, 12802 Jamesburg Drive

Lauren Speight, Planner I (also referred to herein as "staff") presented, and entered the Staff Report into the record through verbal testimony as indicated below, and written documentation, which is attached hereto as Exhibit A, and incorporated herein by reference.

L. Speight, Planner I provided an overview of the variance request as follows:

BACKGROUND:

1. The subject property, Parcel ID 011-211-08 is zoned Corporate Business (Conditional District), CB (CD).
2. The subject property is located within the Town of Huntersville.
3. The subject property is included within Rezoning R19-13 approved by the Huntersville Board of Commissioners 3/16/2020.
4. The subject property was conveyed via deed to MDH F1 Huntersville JV, LLC March 23, 2020. (Exhibit 1)
5. A commercial site plan was submitted to the Town for land development review April 27, 2020 and approved August 24, 2020. Polaris 3G and the approved commercial site plan did not show two intermittent streams (Exhibits 2 and 3) extended from the 35' SWIM buffer shaded in yellow below left. The two intermittent streams were also not identified on conditional rezoning plan R19-13.
6. A building permit for MMF Huntersville Distribution Park - Building A was issued September 24, 2020 based on the approved commercial site plan. (Exhibit 4)
7. A survey dated April 2021 by Kimley-Horn identified two intermittent streams not previously shown on Polaris 3G or the commercial site plan (Figure 4 of Variance Application).
8. A Certificate of Occupancy has not yet been issued for Building A.
9. Per Article 8.25.1 of the Zoning Ordinance, "The purpose of a stream buffer network is to filter pollutants, store floodwaters, provide habitat, and contribute to the "green infrastructure." Vegetated lands adjacent to the stream channel in the drainage basin serve as "buffers" to protect the stream's ability to fulfill its natural functions. Buffers have the primary natural functions of protecting water quality by filtering pollutants, providing intermittent storage for floodwaters, allowing channels to meander naturally, and providing suitable habitat for wildlife." (Exhibit 5)
10. Per Article 8.25.9 of the Zoning Ordinance, "Buffer boundaries including all buffer zones must be clearly delineated on all site-specific plans for Board of Commissioner approval, on all construction plans, including grading and clearing plans, erosion and sediment control plans, and site plans."
11. And, Per Article 8.25.4, S.W.I.M. Stream Buffers, throughout the jurisdiction of the Town of Huntersville shall be delineated by Mecklenburg County through its geographic information system (GIS), Polaris 3G.
12. Construction at the site has been ongoing since the building permit was issued in August 2020 (photo below from February 2021). Highlighted area shows approximate location of intermittent streams.
13. Staff received a variance application from Chris Stanley on behalf of MDH F1 Huntersville JV, LLC June 2, 2021. (Exhibit 6). According to the application, once it was discovered the two intermittent streams were impacted by development "...Town, State, and Corps were notified..."
14. Article 8.25.11 provides nine different options to mitigate impacts on SWIM Buffers when an applicant is seeking a variance. The ordinance states that any of these mitigation techniques shall be construed by the Board of Adjustment to be evidence responsive to Section 11.3.2(e)(4) consistent with adopted plans and protection of public safety and welfare.

STAFF FINDINGS (ordinance standards are in italics):

Please see Exhibit 6 for the applicant's responses to the required criteria for granting a variance.

In considering any variance request, the following Standards for Granting a Variance of the Huntersville Zoning Ordinance (Article 11.3.2.e) must be addressed:

Article 11.3.2.e Standards for Granting a Variance of the Huntersville Zoning Ordinance:

Before granting a variance, the Board of Adjustment shall have made the following findings:

Standards for Granting a Variance. When unnecessary hardships would result from carrying out the strict letter of a zoning ordinance, the Board of Adjustment shall vary any of the provisions of the ordinance upon a showing of all of the following:

- 1) *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.*

Staff Findings:

- A. The applicant states the S.W.I.M. Buffer surrounding the two intermittent streams has already been disturbed and additional hardship would result from the demolition of the existing construction and reestablishment of the original buffer.
- B. Per sheet C402 of the variance application, the area impacted by the intermittent streams is minimal.
- C. Polaris 3G and the approved commercial site plan do not show the two intermittent streams that are identified in Figure 4 of the variance application. (Exhibits 2 and 3)
- D. The applicant also states the Buffer did not appear on site plans as the result of an option not selected in the applicant's development system.
- E. If a variance is granted, mitigation is required for the disturbance per one of the prescribed methods indicated in Article 8.25.11.
- F. If a variance is not granted, restoration of the intermittent streams is required and the applicant would be required to remove permanent structures from the S.W.I.M. Buffer.
- G. As mitigation or restoration of the Buffer is required regardless, Staff finds unnecessary hardship would result from the strict application of the Ordinance. The additional demolition of within the Buffer would cause greater disturbance than mitigation alone.

- 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.*

Staff Findings:

- A. S.W.I.M. Stream Buffers are present throughout the Town of Huntersville and are not peculiar to the property.
- B. Polaris 3G and the approved commercial site plan do not show the two intermittent streams that identified in Figure 4 of the variance application
- C. The applicant states the Buffer did not appear on site plans as the result of an option not selected in the applicant's plan system.
- D. Staff finds that while S.W.I.M. Stream Buffers are not unique to the subject property, it is unique the two intermittent streams were not delineated by Mecklenburg County through its geographic information system (GIS), Polaris 3G.

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

Staff Findings:

- A. According to the variance application, the property owner, MDH F1 Huntersville JV, LLC, "...was unaware of the stream buffer as it did not show up on the GIS maps and was turned off on the subject plans." The intermittent streams were also not identified on the conditional rezoning plans for R 19-13 approved by Huntersville on 3/16/2020.
- B. While Article 8.25.4 indicates, S.W.I.M. Stream Buffers, throughout the jurisdiction of the Town of Huntersville shall be delineated by Mecklenburg County through its geographic information system (GIS), the applicant also states the Buffer did not appear on site plans as the result of an option not selected in the applicant's development system.

- C. Staff does find the property owner, MDH F1 Huntersville JV, LLC was unaware of the intermittent SWIM buffers at the time a building permit was issued.
- 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.*

Staff Findings:

- A. Per Article 8.25.11, regarding variance applications from S.W.I.M Buffer requirements, site specific mitigation plans using the mitigation techniques set out below and approved by the designated agency shall be construed by the Board of Adjustment to be evidence responsive to Section 11.3.2 e), subparagraph 4. The applicant has submitted a buffer mitigation plan that uses one the approved mitigation techniques set for in Article 8.25.11.
- B. The applicant is proposing:
(5) Bottom Land Hardwood Preservation. On a 2:1 acreage basis for impacted stream and buffer area 2 acres of bottomland hardwood for each acre of disturbed area), the owner may provide a combination of the preservation of existing bottom land hardwood forest or other specifically approved natural heritage area by conservation easement or other legal instrument, and the implementation of structural or non-structural BMPs to achieve specific pollutant removal targets within the impacted area. Plan to be approved by Mecklenburg County Land Use and Environmental Services Agency.
- C. The site mitigation plan is still under review and has not yet been approved by the County Storm Water Administrator.
- D. Pending the ultimate approval by the County Storm Water Administrator, Staff finds this requirement can be satisfied.

STAFF POSITION:

The applicant is seeking a variance from Article 8.25.11 of the Zoning Ordinance. Article 8.25.11 indicates strict parameters for disturbance allowed dependent upon the location of the disturbance within the Buffer and type of disturbance proposed. Disturbance not permitted by Article 8.25.11 requires a variance from the Board of Adjustment and a site mitigation plan approved by the designated agency. Staff finds the application meets the four requirements for granting a variance and therefore recommend approval of the request based on the below Staff Findings:

1. The subject property, Parcel ID 011-211-08 is zoned Corporate Business (Conditional District), CB (CD).
2. The subject property is located within the Town of Huntersville.
3. The subject property is included within Rezoning R19-13 approved by the Huntersville Board of Commissioners 3/16/2020.
4. The subject property was conveyed via deed to MDH F1 Huntersville JV, LLC March 23, 2020. (Exhibit 1)
5. A commercial site plan was submitted to the Town for land development review April 27, 2020 and approved August 24, 2020. Polaris 3G and the approved commercial site plan did not show two intermittent streams (Exhibits 2 and 3) extended from the 35' SWIM buffer shaded in yellow below left. The two intermittent streams were also not identified on conditional rezoning plan R19-13.
6. A building permit for MMF Huntersville Distribution Park - Building A was issued September 24, 2020 based on the approved commercial site plan. (Exhibit 4)
7. A survey dated April 2021 by Kimley-Horn identified two intermittent streams not previously shown on Polaris 3G or the commercial site plan (Figure 4 of variance application).
8. A Certificate of Occupancy has not yet been issued for Building A.
9. Per Article 8.25.1 of the Zoning Ordinance, "The purpose of a stream buffer network is to filter pollutants, store floodwaters, provide habitat, and contribute to the "green infrastructure." Vegetated

lands adjacent to the stream channel in the drainage basin serve as “buffers” to protect the stream’s ability to fulfill its natural functions. Buffers have the primary natural functions of protecting water quality by filtering pollutants, providing intermittent storage for floodwaters, allowing channels to meander naturally, and providing suitable habitat for wildlife.” (Exhibit 5)

10. Per Article 8.25.9 of the Zoning Ordinance, “Buffer boundaries including all buffer zones must be clearly delineated on all site-specific plans for Board of Commissioner approval, on all construction plans, including grading and clearing plans, erosion and sediment control plans, and site plans.”
11. And, Per Article 8.25.4, S.W.I.M. Stream Buffers, throughout the jurisdiction of the Town of Huntersville shall be delineated by Mecklenburg County through its geographic information system (GIS), Polaris 3G.
12. Construction at the site has been ongoing since the building permit was issued in August, 2020 (photo below from February 2021). Highlighted area shows approximate location of intermittent streams.
13. Staff received a variance application from Chris Stanley on behalf of MDH F1 Huntersville JV, LLC June 2, 2021. (Exhibit 6). According to the application, once it was discovered the two intermittent streams were impacted by development “...Town, State, and Corps were notified...”.
14. Article 8.25.11 provides nine different options to mitigate impacts on SWIM Buffers when an applicant is seeking a variance. The ordinance states that any of these mitigation techniques shall be construed by the Board of Adjustment to be evidence responsive to Section 11.3.2(e)(4) consistent with adopted plans and protection of public safety and welfare.
15. The applicant states the S.W.I.M. Buffer surrounding the two intermittent streams has already been disturbed and additional hardship would result from the demolition of the existing construction and reestablishment of the original buffer.
16. Per sheet C402 of the variance application, the area impacted by the intermittent streams is minimal.
17. If a variance is granted, mitigation is required for the disturbance per one of the prescribed methods indicated in Article 8.25.11.
18. If a variance is not granted, restoration of the intermittent streams is required and the applicant would be required to remove permanent structures from the S.W.I.M. Buffer.
19. As mitigation or restoration of the Buffer is required regardless, Staff finds unnecessary hardship would result from the strict application of the Ordinance. The additional demolition of within the Buffer would cause greater disturbance than mitigation alone.
20. S.W.I.M. Stream Buffers are present throughout the Town of Huntersville and are not peculiar to the property.
21. Polaris 3G and the approved commercial site plan do not show the two intermittent streams that are called out in Figure 4 of the variance application. (Exhibits 2 and 3 and below)
22. While Article 8.25.4 indicates, S.W.I.M. Stream Buffers throughout the jurisdiction of the Town of Huntersville shall be delineated by Mecklenburg County through its geographic information system (GIS), the applicant states the Buffer did not appear on site plans as the result of an option not selected in the applicant’s plan system.
23. Staff finds that while S.W.I.M. Stream Buffers are not unique to the subject property, it is unique the two intermittent streams were not delineated by Mecklenburg County through its geographic information system (GIS), Polaris 3G.
24. According to the variance application, the property owner, MDH F1 Huntersville JV, LLC, “...was unaware of the stream buffer as it did not show up on the GIS maps and was turned off on the subject plans.” The intermittent streams were also not identified on the conditional rezoning plans for R 19-13 approved by Huntersville on 3/16/2020.
25. Staff does find the property owner, MDH F1 Huntersville JV, LLC was unaware of the intermittent SWIM buffers at the time a building permit was issued.
26. Per Article 8.25.11, regarding variance applications from S.W.I.M Buffer requirements, site specific mitigation plans using the mitigation techniques set out below and approved by the designated agency shall be construed by the Board of Adjustment to be evidence responsive to Section 11.3.2 e), subparagraph 4. The applicant has submitted a buffer mitigation plan that uses one the approved mitigation techniques set for in Article 8.25.11.
27. The applicant is proposing:

(5) Bottom Land Hardwood Preservation. On a 2:1 acreage basis for impacted stream and buffer area 2 acres of bottomland hardwood for each acre of disturbed area), the owner may provide a combination of the preservation of existing bottom land hardwood forest or other specifically approved natural heritage area by conservation easement or other legal instrument, and the implementation of structural or non-structural BMPs to achieve specific pollutant removal targets within the impacted area. Plan to be approved by Mecklenburg County Land Use and Environmental Services Agency.

28. The site mitigation plan is still under review and has not yet been approved by the County Storm Water Administrator

29. Pending the ultimate approval by the County Storm Water Administrator, Staff finds this requirement can be satisfied.

Austin Watts, 200 S Tryon Street, Professional expert with Kimley Horn spoke for the applicant as an expert witness. He testified that the error was the result of a layer in AutoCAD being turned off which caused staff not to be notified of the intermittent stream. When the mistake was identified, staff quickly worked to resolve the problem and notify all of the proper agencies to seek permits and remedy the error. Currently a mitigation of two for one of hardwood preservation has been submitted, approximately 18,000 square feet were affected and nearly 40,000 square feet of hardwoods will be preserved.

E. Cecil asked how the layer was turned off, how far along were they in construction when this occurred and if there is an onsite team responsible for monitoring this. A. Watts responded that construction had been underway for 6-8 months before the problem was identified, approximately 30 feet of elevation has been added to the area in question, and there is not an onsite team to monitor this. It is possible that the area did not contain any visible signs of being an intermittent stream given the time of year.

J. Bradshaw asked if this was an error by the firm, what the plan is if the current mitigation offer is not successful, and if the variance is premature since the mitigation is not agreed to. A. Watts responded this was an error by the firm, they are confident that they will be able to use one of the eight mitigation options, and that the current offer has already been approved by Rusty Rozzelle and Mike McIntyre and is awaiting calculations by the Town for possible acceptance.

K. Burton asked how saving trees mitigates stream loss and what will happen to the water that used to run through there. A. Watts stated that tree mitigation is one of the acceptable methods of mitigation outlined by the State and County stormwater. The water will now run down a vegetated slope to the water retention ponds and then continue on as it previously did.

P. Jacobson asked what triggered the discovery of the error. A. Watts responded that the site required extra room at the entrance, while calculating this additional of a few square feet for a new pipe staff turned all layers on and learned of the error.

S. Genenbacher stated so their firm found the error that GIS missed and then brought it to the attention of the proper authorities. A. Watts confirmed that is correct.

P. Jacobson asked how far up the stream ran, if the new method will still achieve zero run off and if the water is still arriving at the same destination. A. Watts stated confirmed there are two detention ponds it will run through and then end at the same place and they will still maintain zero run off.

M. Bennett asked what will keep the same mistake from being made in the future. A. Watts commented it was simply human error.

P. Jacobson confirmed the mitigation efforts then would be for perpetuity, and under what criteria would the detention ponds be maintained. A. Watts confirmed it would be for all perpetuity and the detention ponds are inspected by Town staff and must meet the stormwater criteria established by the County.

S. Genenbacher asked when the mitigation is expected to be approved. B. Priest, Principal Planner

commented that County and Stormwater have already agreed to the proposed mitigation, it is only the Town that needs to sign off on the mitigation for it to be approved. At this time, the Town is completing a review of the tree save that was already indicated for the property to ensure that the mitigation proposed is not double dipping, or counting trees twice. Staff does not see this as a big hurdle and has no reservations that one of the eight available mitigation options can be met by the applicant.

P. Jacobson commented that the downside of requesting a variance with conditions versus an approved mitigation plan is the fiscal impact, he stated he would prefer to wait for clarity related to the mitigation effort and possibly continue this discussion until that time. He asked A. Watts if continuing the item would have a negative detriment to the applicant, A. Watts stated it would not.

J. Bradshaw made a Motion to Continue V21-05 to the regular September meeting. J. Loucks seconded the motion. The motion passed unanimously (7-0).

3.B. Variance 21-07, 15300 Holbrooks Road

3.C. Variance 21-08, 15300 Holbrooks Road

3.D. Variance 21-09, 15300 Holbrooks Road

4. Other Business

E. Cecil advised the Board that a review of the Rules of Procedure has been completed and he would like to bring the findings to the Board for review at either a special meeting or the regular September meeting.

5. Adjourn

J. Bradshaw made a Motion to Adjourn. P. Jacobson seconded the motion. The motion passed unanimously (7-0).