

**TOWN OF CARY
ZONING BOARD OF ADJUSTMENT HEARING
May 7, 2018**

VARIANCE WORKSHEET

IN THE MATTER OF:

CASE NO. 18-V-01

TOWN OF CARY

STATE OF NORTH CAROLINA

APPLICANT NAME:

John Fiedler and Stephanie Fiedler

ADDRESS OF SUBJECT PROPERTY:

110 Morris Branch Court

Cary, NC 27519

PROPERTY OWNER NAMES/ADDRESS (if different from above):

Same as above

STAFF REPRESENTATIVE:

Contact: Will Hartye, Planner II

Phone: (919) 380-5991

Email: will.hartye@townofcary.org

ZONING:

Planned Development District (PDD) Major – Cary Park

REQUEST: The applicant requests a variance from Land Development Ordinance (LDO) Table 6.3-1 to allow a portion of an existing pool patio to encroach 1 foot into the required 5-foot setback for patios, terraces, and similar features that are not covered and are located on the ground and constructed at grade level. Construction has been completed on the pool and patio and a portion of the patio is located in the required setback due to a construction error.

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)].

[Exhibit A:](#) Variance Application

[Exhibit B:](#) Survey by David Barrier dated June 5, 2017

[Exhibit C:](#) Photos of Subject Property

[Exhibit D:](#) Book of Maps 2001 Page 587

[Exhibit E:](#) Land Development Ordinance Table 6.3-1 (Density and Dimensional Standards)

BACKGROUND:

1. An application for a variance ([Exhibit A](#)) was filed by all the owners of the land affected by the variance.
2. The applicant took part in a pre-application conference with Town of Cary staff as required by LDO Section 3.20.3 (B).
3. The Subject Property is described as follows:
Site Address: 110 Morris Branch Court
Subdivision: Cary Park SF3 & SF4
Lot: 5
Wake County PIN: 0725634177
Zoning District: Planned Development District (PDD) Major – Cary Park
4. The Subject Property was platted as part of a subdivision recorded with the Wake County Register of Deeds in Book of Maps 2001 Page 587 ([Exhibit D](#)).
5. The recorded plat shows the Subject Property is 0.33 acres in size and has a 25-foot-wide Cary Park Common Open Space buffer along the rear of the property and a 20-foot drainage easement along the eastern side. The easement reduces the buildable area of the lot.
6. The subject property is developed with an existing, detached residential dwelling and has a patio on the rear of the property.
7. The Town of Cary Land Development Ordinance (LDO) Table 6.3-1 (Projections Permitted into Required Setbacks), requires a 5-foot setback from the property line or any buffer for patios, terraces, and similar features that are not covered and are located on the ground and constructed at grade level ([Exhibit E](#)).

8. John and Stephanie Fiedler received a building permit from the Town in 2015 to construct a pool and patio.
9. A survey of the subject property, prepared by David Barrier Surveying ([Exhibit B](#)), shows the patio for the pool is located 4 feet from the rear property line, and thus encroaches 1 foot into the required 5-foot setback for patios and terraces as established in Table 6.3-1 of the LDO.
10. Director's modification procedures contained in Section 3.19.3 of the LDO would allow an encroachment of up to only 0.75 feet (15% of the required 5-foot setback) and were unable to address the encroachment of 1 foot.
11. 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.
12. The application and other records pertaining to the variance request are part of the record.
13. 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.*

Applicant Position: "Yes, to remove one foot of the patio would reduce the structural integrity of the patio."

Staff Comments: Construction has been completed on the pool and patio. At its closest point, the patio encroaches 1.0 feet into the required 5-foot rear yard setback for pools and terraces. The encroachment is due to a construction error.

(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.*

Applicant's Position: "There was a construction measurement error that is specific to 110 Morris Branch Court. This measurement error was related to the patio construction that is unique to 110 Morris Branch Court."

Staff Comments: The lot size is consistent with other lots in the neighborhood. The lot, however, is impacted by easements which reduce the buildable area more than other similarly situated lots. There is a drainage easement along the eastern side property line. There is also a 25-foot common open space buffer adjacent to the northern property line.

(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.*

Applicant's Position: "The encroachment resulted from a construction measurement error. The building permit called for a survey and noted where the pool and decking needed to be located."

Staff Comments: The encroachment of 1.0 feet into the required 5-foot setback for patios and terraces is the result of a contractor's error during construction.

(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.*

Applicant's Position: "A variance would not interfere with the utility management or public safety. The adjacent land is a dense unbuildable community buffer. Additionally, there is owner-provided landscaping in the setback to minimize visibility of the patio from the adjacent property. The variance does not detract from the appearance of the neighborhood."

Staff Comments: The encroachment is adjacent to a 25-foot-wide area of common space. Public services or utilities are not impacted by the proposed encroachment. Placement of this structure at this location will not place adjacent structures in non-compliance with North Carolina State Building Code.

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: [*insert conditions*]

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.)