

**TOWN OF CARY
ZONING BOARD OF ADJUSTMENT HEARING
August 6, 2018**

VARIANCE WORKSHEET

IN THE MATTER OF:

CASE NO. 18-V-03

TOWN OF CARY

STATE OF NORTH CAROLINA

APPLICANT NAME:

Jamie S. Schwedler
Parker Poe Adams & Bernstein, LLP
P.O. Box 389
Raleigh, NC 27601

ADDRESS OF SUBJECT PROPERTY:

3624 Davis Drive
Cary, NC 27519

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

Leyland Twin Lakes, LLC
P.O. Box 878 – 233 Route 17
Tuxedo, New York 10987

STAFF REPRESENTATIVE:

Contact: Wayne Nicholas, Planning Manager
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REQUEST: The applicant requests a variance from Land Development Ordinance (LDO) Section 6.2.2(C) to allow the property line of a new residential lot to be located 30 feet from an existing 196-foot-tall telecommunications facility.

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](#): Plat recorded in Wake County Register of Deeds Book of Maps 2017 – Page 721

[Exhibit C](#): Land Development Ordinance Section 6.2.2(C)

BACKGROUND:

1. The application for a variance was filed by all the owners for the land affected by the variance.
2. The applicant took part in the pre-application conference required by LDO Section 3.20.3 (B).
3. The property is described as follows:
 - Site Address: 3624 Davis Drive, Cary, NC 27519
 - Wake County PIN: 0745543962
 - Lot: 2
 - Subdivision: Twin Lakes Center
 - Total Lot Size: 12.08 acres
 - Current Zoning District: Planned Development District (PDD) Major – Twin Lakes PDD
4. The property is improved with a 196-foot-tall telecommunications facility (freestanding non-stealth tower), which is located on the property as shown on the Sketch submitted and included with the variance application ([Exhibit A](#)).
5. Based on a plat recorded in the Wake County Register of Deeds in Book of Maps 2017 – Page 721 ([Exhibit B](#)), the property is 12.08 acres in area.
6. The 12.08-acre property is part of the previously approved Twin Lakes Planned Development District (PDD) and is zoned for multi-family residential use.
7. Section 6.2.2(C) of the Land Development Ordinance ([Exhibit C](#)) reads: “*When creating residentially zoned lots from an existing lot or parcel that contains a telecommunications facility tower (stealth or non-stealth), the new lot shall be located no closer to the existing tower than the height of the tower.*”
8. The property owner proposes to divide the existing 12.08-acre property into two lots: a 60' x 60' lot around the existing telecommunications tower; and a 7.04-acre lot that will surround the lot containing the telecommunications facility. The new 7.04-acre lot will be located 30 feet from the telecommunications facility. ([Exhibit A](#)) Section 6.2.2(C) of the LDO would require this lot to be located a minimum of 196 feet from the telecommunications facility.
9. The property owner desires to create two lots so that the telecommunications facility can be on a separate lot from the future planned development of the remaining property as a multifamily residential development. The LDO does not require that these two uses be on separate lots. However, separating the uses on two lots would allow the telecommunications facility operator to own the lot on which the telecommunications facility is located and would more clearly separate that use, and duties and obligations related to that use, from the adjacent multifamily residential use. The property owner proposes, as a condition of approval of a variance, that no buildings will be placed between the outside of the new lot line and a radius of 196 feet from the existing telecommunications tower. ([Exhibit A](#))
10. Director’s Modification procedures (LDO Section 3.19.3) were unable to address the hardship.
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 of the public hearing on this variance request 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's Position: "Unnecessary hardship would result from the application of Sec. 6.2.2(C) because the new lot for the telecommunications facility is not permitted to be closer than the height of the tower, which is 196 feet. The new lot will be 60 x 60 feet, so the tower will be approximately 30' from the new property line at its closest point. It is not possible to create the lot and satisfy the LDO."

Staff Comments: Without the variance, the property owner will not be able to create a separate lot for the telecommunications facility. The LDO does permit the telecommunications facility and the multifamily residential use to be located on the same lot in the locations illustrated on the sketch that accompanied the application ([Exhibit A](#)). A variance is only required because the property owner desires to create two lots.

(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: "The hardship results from the existing size and shape of the parcel, which is bordered by Town property and Hatches Pond. It is also created from the existing location of the telecommunications facility within the parcel, which is on a residentially zoned portion of a much larger parcel. If it were further from the residentially zoned portion, Sec. 6.2.2(C) could be satisfied without a variance."

Staff Comments: The existing parcel is not large enough to provide the necessary separation between the two desired lots and still permit the development desired by the property owner.

(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 hardship did not result from actions taken by the applicant or property owner. The cell tower is a structure that has been in place since 2001, before the Twin Lakes PDD was adopted. It was placed in that location by the cell tower owner, not the applicant or the current owner of the property. The recent rezoning of the property to the north of the tower makes the property a residential lot, and Sec. 6.2.2 applies."

Staff Comments: The current property owner did not erect the telecommunications facility. The need for the requested variance can be viewed as a result of the desire of the applicant to place the existing telecommunications tower on separate lot of real property from any future development.

(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: "The variance is consistent with the spirit and purpose of the LDO, such that substantial justice is achieved because the variance would allow the existing structure to be placed on a separate lot to be owned by the facility operator. This allows the facility operator to also be responsible for the maintenance and creates clearer lines of liability. Public safety will be secured because the area around the facility will primarily be parking, and the owner has offered a condition that no buildings will be placed outside of the new lot line and within the 196' radius that would have otherwise been a lot line. For illustrative purposes only, an example of how this proposed condition may be applied to the property is shown in the attached development plan, which is currently under review by the Town. See Exhibit A. Thus, to the bystander, the lot will appear to comply with Sec. 6.2.2, and neighboring property owners will not be affected. This is consistent with the purposes stated in LDO 3.20.1, because this hardship is due to the placement of the existing tower in this location, and actions taken by others thereafter."

Staff Comments: The zoning condition offered by the applicant addresses the separation concerns that appear to have been the intention of the Ordinance.

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. No buildings will be placed between the outside of the new lot line and a radius of 196 feet from the existing tower.

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*]: