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Memorandum

To: North Carolina Coastal Resources Commission
Fr: Mary Lucasse, Special Deputy Attorney General, NCDOJ
Date: February 11, 2019
Re: Follow-up on our conversation regarding variances.

During the North Carolina Coastal Resources Commission's ("Commission") November 2018 meeting, it received refresher training on the CAMA variance procedure and engaged in a robust discussion of the concept of "unnecessary hardships." During that meeting, I was asked to provide additional information about what is meant by that phrase as it is used in the Commission's variance procedure. In preparing this memo, I reviewed information forwarded by Commissioners and DCM staff; considered various legal treatises, including a blog post by the UNC School of Government on the concept as it is used in zoning decisions; and reviewed discussions of the concept in case law (both North Carolina and other states). I have synthesized information here to provide a guide to the Commission for its consideration. In an attempt to keep this memo relatively user friendly, at the end of this memo I included citations for those Commissioners who might be interested in diving deeper into the issue and provided a summary of the three North Carolina cases that discuss CAMA's unnecessary hardship standard. I hope the rest of you will not get bogged down. I look forward to discussing these issues at the Commission's upcoming meeting.

The Commission's authority to issue a variance from the restrictions imposed on development in Areas of Environment Concern ("AEC") by the Coastal Areas Management Act of 1974 ("CAMA") is provided by the General Assembly in N.C. Gen. Stat. § 113A-120.1. Specifically,

- (a) Any person may petition the Commission for a variance granting permission to use the person's land in a manner otherwise prohibited by rules or standards prescribed by the Commission, or orders issued by the Commission, pursuant to this Article. To qualify for a variance, the petitioner must show all of the following:

- (1) Unnecessary hardships would result from strict application of the rules, standards, or orders.
- (2) The hardships result from conditions that are peculiar to the property, such as the location, size, or topography of the property.
- (3) The hardships did not result from actions taken by the petitioner.
- (4) The requested variance is consistent with the spirit, purpose, and intent of the rules, standards, or orders; will secure public safety and welfare; and will preserve substantial justice.

(b) The Commission may impose reasonable and appropriate conditions and safeguards upon any variance it grants.

The current language of the CAMA variance was amended in 2002 following the Court of Appeals ruling in *Williams v. North Carolina Dept. of Environment and Natural Resources*.¹ This amendment shifted the burden of proving the four variance factors to petitioners and more closely conformed the variance factors to those used in the zoning statute. Specific requirements governing the variance process are included in the Commission's rules. *See e.g.*, 15A N.C. Admin. Code 07J .0701.

The General Assembly has authorized counties and municipalities to issue variances from zoning ordinances when practical difficulties or unnecessary hardships would result from carrying out the strict letter of those ordinances and granting a variance would be consistent with the spirit of the ordinance, would secure public safety and welfare, and would allow for substantial justice to be done.² The General Assembly has allowed variances based on a finding of unnecessary hardship in other statutes as well.³ Given the similarity in the CAMA and zoning statutes allowing for variances, the case law on the application of the unnecessary hardship standard under the zoning statute is particularly useful to our analysis here.

I. Variances may be granted if certain conditions are met.

A variance allows a landowner "to use or build on land in a way prohibited by strict application of a zoning ordinance" if certain conditions are met.⁴ It provides a means for a landowner to seek relief when the hardship imposed on an individual parcel of land outweighs the public benefit sought by the regulation and is out of proportion to the hardship shared in common with other property owners who also benefit from the restrictions. The ability to issue a variance has been described as a "safety valve" which waives strict application "of the zoning ordinance without sacrifice to its spirit and purposes."⁵ The purpose of the variance process is to provide flexibility and to prevent practical difficulties and unnecessary hardships resulting from strict interpretations of zoning ordinances.⁶

A petitioner has a heavy burden to establish in requesting a variance:

The power to grant variances from the strict application of zoning ordinances should be carefully and sparingly exercised, because unless great caution is used and variances are granted only in proper cases, the whole fabric of town-wide and city-wide [and coast-wide] zoning will be worn through in spots and raveled at the edges until its purpose in protecting the property values and securing the orderly development of the community is completely thwarted.⁷

To avoid rezoning by variance or spot zoning, variances should only be exercised in exceptional cases.⁸ If similar variance requests relating to a particular rule are often granted, the best practice is to consider revising the rule. In the past, the Commission and staff have considered whether the 30-foot buffer rule should be revised to allow some development in the buffer if an engineered stormwater system was included in the plans and maintenance of that system was required by local ordinance. The Commission and staff also considered rule revision for development proposed for a lot on a canal system where the buffer applied to multiple sides of the lot. Eventually, Commission and staff concluded that variations in the situations presented required these types of development to be addressed through the variance process.

II. A hardship is not the same as an “unnecessary hardship”

Zoning ordinances limit what property owners can do with their property within zoning districts. These restrictions are compensated for by similar restrictions on neighboring property. “Such hardship, consistent with the hardship imposed on all other pieces of property in the district, is not a ground for a variance.”⁹ To be considered an unnecessary hardship, a hardship must be different in kind from those generally affecting properties in the same zoning district.¹⁰

Likewise, the CAMA provisions impose some degree of hardship on all property within the twenty coastal counties. Consider, for example, a situation in which an ocean front setback based on a high erosion rate may cause a hardship on property in the Ocean Hazard AEC. The applicable setback limits the placement of development and the area available for development on all similarly situated lots with the same erosion rates. The restrictions imposed for the purpose of protecting life and property¹¹ on one lot in the ocean hazard AEC are consistent with restrictions on all other similarly situated properties rendering any resulting hardships necessary to meet the purpose of the rule. As long as the hardship is imposed on all similarly situated properties, such a restriction, without more, would not provide grounds for a variance.

III. When is a hardship an “Unnecessary hardship”?

There “is no simple formula” for determining when a hardship is an unnecessary hardship. Each variance request is considered on a case-by-case basis on the evidence presented.¹² The Commission is not required to grant a variance merely because it granted another petitioner a variance for the same type of property which was subject to the same type of

CAMA restrictions. However, if the facts relating to separate variance requests are exactly the same, the Commission's decision should be the same. When factors differ, the Commission may reach different results.¹³ The types of factors relevant to an assessment of whether a hardship is unnecessary include the following:

A. Consider whether there is a Reasonable Use of the Property.

“An unnecessary hardship occurs where the restriction when applied to the property in the setting of its environment is so unreasonable as to constitute an arbitrary and capricious interference with the basic right of private ownership.”¹⁴ Such interference with property ownership can result from restrictions that prevent a property owner from making a reasonable use of the property consistent with the uses made of similarly situated property. Thus, one factor for the Commission to consider is whether the Petitioner can make reasonable use for the property.

In the past, many jurisdictions applied a standard requiring the applicant to show that there is no reasonable use of the property without a variance. Following a 2013 amendment to North Carolina's statute governing local zoning ordinance, it now explicitly states, “It is not necessary to demonstrate that, in the absence of the variance, no reasonable use can be made of the property.”¹⁵ This change appears to allow flexibility to grant a zoning variance even if there are reasonable uses that can be made of the property. Following *Williams*, the variance statute was amended to shift the burden of proving the four variance factors to Petitioner. The revised CAMA does not mirror the explicit language included in the zoning statute regarding reasonable use.¹⁶ Therefore, I recommend that as part of any unnecessary hardship analysis, the best practice for the Commission when it denies a request would be to include findings of fact, based on the stipulated facts submitted by the parties, as to whether in the absence of a variance some reasonable use could be made of the property.

Note, even if petitioner argues that no reasonable use can be made of the property, the Commission is not required to grant a variance. A variance can only be granted when Petitioner has established all four of the variance criteria. If a variance is denied and Petitioner can establish there is no reasonable use for the property, CAMA expressly allows a property owner to bring a takings claim seeking compensation.¹⁷ This would take place in a proceeding that is separate from your variance proceeding.

B. Consider Financial Impact along with other Factors.

Case law regarding zoning and CAMA variances is consistent and establishes “pecuniary loss alone is not enough to show an ‘unnecessary hardship’ requiring a grant of a variance.”¹⁸ Pecuniary loss can take several forms. For example, if construction has begun, a property owner might argue a variance should be granted based on the cost to bring the project into compliance. Another argument is that without a variance, the site will not make its highest financial return. Neither argument standing alone is sufficient to constitute an unnecessary hardship. However, pecuniary loss is a factor to be taken into consideration and should not be ignored.¹⁹

C. Consider Unique Nature of the Property.

The second factor of the CAMA statute requires petitioner to establish that “the hardships result from conditions that are peculiar to the property, such as the location, size, or topography of the property.” The hardship described in this second factor arguably requires that strict application of the regulation cause an unequal burden on the property as a result of some unique aspect of the property different than the burden on neighboring properties. It is this unequal burden that has been described as an unnecessary hardship and, I would argue, intertwines consideration of the first and second factor. The Commission may determine additional unnecessary hardship that do not result from conditions peculiar to the property. But, I think that because the second factor is a required factor under the CAMA variance criteria, the Commission is required to find that some aspect of the hardship is based on conditions peculiar to the property before granting any variance. The other factors that could be considered in an analysis of what is an unnecessary hardship may differ based on the facts of the case. But, the Commission is always required to consider whether there is some feature of the property that causes the ordinance to have a more burdensome effect on the applicant’s property than on neighboring properties.

In past variance requests, the Commission has consider whether the 30 foot buffer ordinance unequally burdens a property with a man-made canal on two sides compared to the burden on neighboring properties where the canal is only present on one property line. The Commission also found peculiar conditions existed on a lot near the North River Bridge which serves as a gateway to “Down East” when there were county setbacks, a DOT right-of-way setback, and limitations on the sightlines caused by a curve in the road. These conditions limited the location on the property where a sign could be installed (and still be visible) and the Commission found that strict application of the CAMA regulations prohibiting non-water dependent development in coastal wetlands imposed an unequal burden on the property.

D. Do Not Consider Property Owner’s Situation.

Whether an unnecessary hardship exists depends upon the unique nature of the property not the personal situation of the landowner. In the past, the Commission denied a variance request when the petitioner owned other property on which the development could be constructed without damage to coastal wetlands. In that case, the North Carolina Court of Appeals overturned the Commission’s decision based on its finding that it was immaterial whether a petitioner owned other property. The Court held that considering the personal situation of the landowner was improper because it would result in different petitioners being treated differently based on whether they owned other property even if the property for which the variance was sought was the same.²⁰

Another fact pattern implicating this issue was raised during The Riggings Homeowner’s request for a variance. At one point, the Commission denied Petitioner’s request to maintain a temporary sandbag erosion control structure on the beach in front of its buildings based in part on the Commission’s finding that sandbags had been present on the property for almost 30 years

pursuant to a permit and variances and could no longer be considered temporary. Because the intent of the statute was that erosion control structures only be allowed to remain on the beach temporarily, the Commission found that the hardship caused by strict application of the sandbag statute was necessary. The Court of Appeals was not persuaded by the Commission's argument that the prior variances and permits run with the land²¹ and were therefore related to the property. It held that since the variances and permits had been issued to petitioner, these factors were related to the petitioner not to the property and thus, immaterial to the unnecessary hardship analysis.²² The North Carolina Supreme Court affirmed the Court of Appeal's decision without precedential value.²³ Given the Supreme Court's decision, I would argue that the Commission could again make the argument that permits and/or variances run with the land and could be considered as a fact material to the property.

E. Consider whether Request is consistent with CAMA and rules.

The requirement that the variance only be granted if it will not harm the intent of statute or rules is both implicit in the consideration of "unnecessary hardship and is also explicitly stated in CAMA's fourth variance criteria. This is another example of the way in which the Commission's consideration of the different variance criteria will, at times, appear to be duplicative. As explained by the North Carolina Supreme Court, a finding of "unnecessary hardship" should not be used to

Abrogate the very intent and purpose of the ordinance, amend, if not partially repeal, an act regularly adopted by the local Legislature, and create a means by which the entire ordinance could be frustrated at will by limitless exceptions. It cannot be construed to include a hardship imposed upon all alike so as to effectuate the primary purpose and intent of the legislative body.²⁴

In cases where strict application of the rules does not accomplish the policy objectives and goals, or does little to accomplish them, the resulting hardship may be unnecessary. A "board cannot disregard the provisions of the statute or its regulations. It can merely 'vary' them to prevent injustice when the strict letter of the provisions would work 'unnecessary hardship.'"²⁵ As pointed out during the Commission's discussion, it is not the Commission's purpose to restrict what the property owner wishes to do, within reason, when doing so does not further the policy objectives and goals of CAMA. The term "unnecessary" connotes the idea that it is not essential to maintain the restriction complained of because no harm would befall neighboring properties and the purpose of the regulation would not be contravened by granting the variance. On the other hand, when strict application of the rules accomplishes the policy objectives and goals the resulting hardship may be necessary.

Based on this principle, a request for a zoning variance to allow construction of a grocery store-service station in a residential area was denied, as the request would subvert the intent and purpose of having a residential zoning designation.²⁶ Similarly, in an unpublished decision, the North Carolina Court of Appeals upheld the Commission's denial of a request for a variance

from CAMA to enable Petitioners to build within the ocean hazard setback. It found the request was not within the spirit and purpose of the ocean hazard rules and would not promote substantial justice because it would be unfair to other property owners who had constructed structures based on required setbacks or whose structures were grandfathered.²⁷

IV. Conclusion

In determining whether strict application of CAMA causes unnecessary hardship, the Commission is required to approach the subject through each of the criteria identified by the General Assembly in the CAMA variance statute. These concepts are connected and intertwined. The concept of unnecessary hardship contemplates that the strict application of CAMA would impose an unequal burden on the property and prevent reasonable use of the property. In addition, by listing such other specific concepts in the second, third, and fourth factors in the statute, the legislature alerted the Commission to additional factors which if not found would result in a conclusion that the hardship caused by strict application is necessary. Following is a summary of three North Carolina cases.

* * * * *

Review of North Carolina cases with applicable discussion of CAMA

Williams v. North Carolina Dept. of Environment and Natural Resources, 144 N.C. App. 479, 548 S.E.2d 793 (2001)(based on original CAMA variance statute). In this case, the CRC denied variance for construction in coastal wetlands based on finding of no unnecessary hardship when petitioner owned other property on which to place development. Court held:

- Superior Court lacked authority to grant a variance and must remand to Commission for decision.
- Whether strict application of the CAMA places “unnecessary hardship” on property, depends upon unique nature of property, not landowner. If “hardship” stemmed from landowner’s situation, then persons owning less land would have easier time showing unnecessary hardship than those owning multiple parcels and cause equal protection issue.
- Fact that landowner owned other property did not establish lack of “unnecessary hardship” and should not be considered as it relates to applicant not property.
- To determine whether property suffers from “unnecessary hardship” due to strict application of CAMA, Commission must make Findings of Facts and Conclusions of Law as to impact of CAMA on landowner's ability to make reasonable and significant use of property.

Midgett v. N. Carolina Coastal Res. Comm'n, 212 N.C. App. 420, 713 S.E.2d 791 (2011) (*unpublished*). COA reversed superior court’s decision to reverse Commission’s denial of variance request holding:

- Erosion setback on property was 420 feet from first line of stable natural vegetation based on an average annual erosion rate of 14 feet per year leaving building envelope of 34 by 66 feet.
- Proposed development was approximately 272 feet landward of vegetation line.
- Commission denied variance based on petitioner’s failure to show 2nd, 3rd, and 4th factor.
- COA held petitioner had burden to show all four factors. And, there was substantial evidence in the record to conclude that the request for a valance was inconsistent with the spirit and purpose of the ocean hazard rules and would not promote substantial justice because it would

be unfair to other existing owners who had constructed structures based on the required setback distances or whose structures were grandfathered.

- Although there is contrary evidence in record, reviewing court is not permitted to substitute its judgment for that of Commission.

Riggings Homeowners, Inc. v. Coastal Res. Comm'n, 228 N.C. App. 630, 747 S.E.2d 301 (2013) *aff'd by equally divided court* 367 N.C. 643, 766 S.E.2d 320 (2014). Decision followed cross-appeals of superior court's decision on judicial review of CRC's denial of variance to retain sandbags. It stands without precedential value since N.C. Supreme Court was equally divided. Aspects of COA decision relating to unnecessary hardships include following:

- Without explaining basis for statement, Court held CRC not required to make "reasonable use" determination before denying variance.
- Court rejected CRC's argument that length of time sandbags had been in place authorized by prior permit and variances related to the property and should be considered in the "unnecessary hardships" analysis. Instead, the Court held a prior permit or variance requests are immaterial as they relate to property owner rather than property.
- COA declined to address argument that CRC could find hardships exist under 2nd and 3rd factors yet not find hardship unnecessary in 1st factor.
- COA reviewed 4th factor as matter of law and did its own balancing of private property interests and competing public interests. COA did not review whole record to determine whether there was substantial evidence in the record to support CRC's decision. COA substituted its own judgment for CRC's finding that private property interests outweighed public interests.

Endnotes

¹ 144 N.C. App. 479, 548 S.E.2d 793 (2001).

² See N.C. Gen. Stat. § 160A-388(d) (2018) which replaced former N.C. Gen. Stat. §§ 160-172 and -178 (2013).

³ For example, N.C. Gen. Stat. § 63-32 (2018) provides a process to request a variance from airport zoning regulations. N.C. Gen. Stat. § 136 – 44.50 (2018) allows individuals to request variances from limitations on development imposed by the Transportation Corridor Official Map Act.

⁴ Laura Hunter Dietz & Anne E. Melley, *Variances, Generally; Authority to Grant*, in Strong's North Carolina Index 4th Zoning §§107, 108, and 109 (Feb. 2019 update).

⁵ Eric M. Larsson, *Proof of Hardship Necessary for Zoning Variance*, in 131 Am. Jur. Proof of Facts 3rd 253 (Nov. 2018 update). See also, *Husnander v. Town of Barnstead*, 139 N.H. 476, 478, 660 A.2d 477, 478 (1995) citing 3 E. Ziegler, Rathkopf's The Law of Zoning and Planning, § 38.01[1] (4th ed. 1994).

⁶ James A. Webster, Jr., Patrick K. Hetrick & James B. McLaughlin, Jr., *Webster's Real Estate Law in North Carolina* § 18–19, at 874 (5th ed.1999); see also N.C. Gen. Stat. § 160A–388(d) (2009).

⁷ Larsson, *supra*, §13.

⁸ *Lee v. Board of Adjustment*, 226 N.C. 107, 111, 37 S.E. 2d 128, 132 (1946).

⁹ Arden H. Rathdopf, et al., *The Law of Zoning and Planning* § 58:5 (4th ed. Nov. 2018 update) (Emphasis added).

¹⁰ *Dupont v. Zoning Bd. of Appeals of Town of Manchester*, 834 A.2d 801, 803 (Conn. 2003) (citations and punctuation omitted); see also Larssen, *supra*, at §16.

¹¹ E.g., 15A N.C. Admin Code 07H .0301, .0303(b), and .0306(a)

¹² Adam Lovelady, *Variance Standards: What is Hardship and When is it Unnecessary?* Coates Canons: NC Local Government Law Blog (May 27, 2014), <https://canons.sog.unc.edu/variance-standards-what-is-hardship-and-when-is-it-unnecessary/>.

¹³ *Through The Looking Glass, Inc. v. Zoning Bd. of Adjustment for City of Charlotte*, 136 N.C. App. 212, 523 S.E.2d 444 (1999).

¹⁴ *Showcase Realty and Const. Co. v. City of Fayetteville Bd. of Adjustment*, 155 N.C. App. 548, 542, 573 S.E. 2d 737, 741 (2002) citing *Williams v. N.C. Dep't of Env't & Natural Res.*, 144 N.C. App. 479, 486, 548 S.E.2d 793, 798 (2001)(Citations and punctuation marks omitted); *but see Riggings Homeowners, Inc. v. Coastal Resources Com'n*, 367 N.C. 643, 766 S.E.D2d 320 (2014) (Court of Appeals held that following statutory amendment, Commission does not have the burden of making "a 'reasonable use' determination before denying a variance request.").

¹⁵ N.C. Gen. Stat. § 160A-388; *see also*, Lovelady, *supra*.

¹⁶ N.C. Gen. Stat. § 113A-120.1.

¹⁷ N.C. Gen. Stat. 113A-123(b)(2009) (The court shall determine whether a final decision of the Commission so restricts the use of property as to deprive a person of the practical uses and constitutes a taking.).

¹⁸ *See*, Dietz & Melley, *supra*, § 108; *see also* *Turik v. Town of Surf City*, 182 N.C. App. 427, 642 S.E.2d 251 (2007) and *Williams v. N.C. Dep't of Env't & Natural Res.*, 144 N.C. App. 479, 486, 548 S.E. 2d 793, 798 (2001).

¹⁹ *Williams*, 144 N.C. App. at 486, 548 S.E.2d at 798 (2001).

²⁰ *Id.*

²¹ For a discussion of this issue, *see*, 83 Am. Jur. 2d Zoning and Planning § 710 citing *R and R Pool and Patio, Inc. v. Zoning Bd. of Appeals of Town of Ridgefield*, 19 A.3d 715 (Conn. 2011); *Sheppard v. Zoning Bd. of Appeal of Boston*, 963 N.E.2d 748 (Mass. App. Ct. 2012); *Campus Associates L.L.C. v. Zoning Bd. of Adjustment of Tp. of Hillsborough*, 996 A.2d 1054 (N.J. App. Div. 2010).

²² *Riggings Homeowners, Inc. v. Coastal Resources Com'n*, 228 N.C. App. 630, 642, 747 S.E.2d 301, 308-209 (2013).

²³ *Riggings Homeowners, Inc. v. Coastal Resources Com'n*, 367 N.C. 643, 766 S.E.D2d 320 (2014).

²⁴ *Lee v. Bd. of Adjustment of City of Rocky Mount*, 226 N.C. 107, 111, 37 S.E.2d 128, 132 (1946).

²⁵ *Showcase Realty and Const. Co. v. City of Fayetteville Bd. of Adjustment*, 155 N.C. App. 548, 542, 573 S.E. 2d 737, 741 (2002) citing *Lee v. Board of Adjustment*, 226 N.C. 107, 111, 37 S.E. 2d 128, 132 (1946).

²⁶ *Sherrill v. Town of Wrightsville Beach*, 76 N.C. App 646, 648, 334 S.E.2d 103, 104 (1985).

²⁷ *Midgett v. North Carolina Coastal Resources Com'n*, 212 N.C. App. 420, 713 S.E.2d 791 (2011) (unpublished).