



**Town of Hilton Head Island  
Board of Zoning Appeals  
Regular Meeting  
Monday, August 24, 2015 2:30 p.m.  
Benjamin M. Racusin Council Chambers  
AGENDA**

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1. **Call to Order**
2. **Pledge of Allegiance to the Flag**
3. **Roll Call**
4. **Freedom of Information Act Compliance**  
Public notification of the Board of Zoning Appeals meeting has been published, posted and mailed in compliance with the Freedom of Information Act and the requirements of the Town of Hilton Head Island Land Management Ordinance.
5. **Welcome and Introduction to Board Procedures**
6. **Approval of Agenda**
7. **Approval of the Minutes – Regular Meeting July 27, 2015**
8. **Unfinished Business**  
**Public Hearing**  
**VAR-001204-2015:**  
Greg Francese of Cuda Company Real Estate, on behalf of property owner Charles Lasky, is requesting a variance from Land Management Ordinance Section 16-6-102.D, Wetland Buffer Standards, in order to construct a patio and dock within the 20 foot tidal wetland buffer. The property is located at 8 Queens Way and is further identified as parcel 301 on Beaufort County Tax Map 16A.  
*Presented by: Nicole Dixon*
9. **New Business**  
**Hearing**  
**Motion to Reconsider VAR 1055-2015:** Jack Qualey, on behalf of the owners of 22 Bradley Circle, is requesting that the Board of Zoning Appeals reconsider their decision to deny the requested variances for 22 Bradley Circle.
10. **Board Business**
11. **Staff Reports**  
Waiver Report
12. **Adjournment**

Please note that a quorum of Town Council may result if four or more Town Council members attend this meeting.

**TOWN OF HILTON HEAD ISLAND**  
**Board of Zoning Appeals**  
**Minutes of July 27, 2015 2:30pm Meeting**  
**Benjamin M. Racusin Council Chambers**

Board Members Present: Acting Chairman Jeffrey North, David Fingerhut, Steve Wilson, John White, Lisa Laudermilch and Jerry Cutrer

Board Members Absent: Chairman Glenn Stanford

Council Members Present: None

Town Staff Present: Nicole Dixon, Senior Planner & Board Coordinator  
Teri Lewis, LMO Official  
Brian Hulbert, Staff Attorney  
Anne Cyran, Senior Planner  
Charles Cousins, Director of Community Development  
Jill Foster, Deputy Director of Community Development  
Kathleen Carlin, Secretary

**1. Call to Order**

**2. Pledge of Allegiance to the Flag**

**3. Roll Call**

**4. Freedom of Information Act Compliance**

Public notification of the Board of Zoning Appeals meeting has been published, posted and mailed in compliance with the Freedom of Information Act and the requirements of the Town of Hilton Head Island Land Management Ordinance.

**5. Swearing in Ceremony for New and Reappointed Board of Zoning Appeals Members**

Brian Hulbert, Esq., performed the swearing in ceremony for reappointed BZA member, Mr. Steve Wilson, and new BZA members, Mr. John White, Ms. Lisa Laudermilch, and Mr. Jerry Cutrer. Chairman North welcomed the members and thanked them for their service.

**6. Election of Officers for the July 1, 2015 – June 30, 2016 term**

Chairman North made a **motion** to elect Mr. Glenn Stanford to serve as Chairman for the new term. Mr. Wilson **seconded** the motion. There were no additional nominations for the office of Chairman and the motion to elect Mr. Stanford as Chairman **passed** unanimously.

Mr. Fingerhut then made a **motion** to elect Mr. Jeffrey North to serve as Vice Chairman for the new term. Mr. Wilson **seconded** the motion. There were no additional nominations for the office of Vice Chairman and the motion to elect Mr. North as Vice Chairman **passed** unanimously.

Chairman North then made a **motion** to appoint Ms. Kathleen Carlin to serve as Secretary for the new term. Mr. Fingerhut **seconded** the motion and the motion **passed** unanimously.

**7. Welcome and Introduction to Board Procedures**

Chairman North welcomed the Board, the staff, the applicants, and the public to today's meeting. Chairman North reviewed the BZA's procedures for conducting the business meeting.

**8. Approval of Agenda**

The agenda was **approved** as presented by staff by general consent.

**9. Approval of the Minutes**

Mr. Fingerhut made a **motion** to **approve** the minutes of the March 23, 2015 meeting as presented. Mr. Wilson **seconded** the motion and the motion **passed** unanimously.

**10. Unfinished Business**

None

**11. New Business**

**Public Hearing**

**VAR-000939-2015:**

HHI Partners, LLC is requesting a variance from Land Management Ordinance (LMO) Section 16-4-102.B.4.b.i, Use-Specific Conditions for Principal Uses, in order to construct guest rooms on the first floor of a proposed hotel in the Coligny Resort (CR) zoning district. They are also requesting a variance from LMO Section 16-3-105.B.3, Development Form and Parameters, in order to allow a portion of the hotel to be greater than 60' in height. The property is located at 81 Pope Avenue and is further identified as parcel 10 on Beaufort County Tax Map 18. Chairman North introduced the application, opened the public hearing, and requested that the staff make their presentation.

Ms. Teri Lewis made the presentation on behalf of staff. Ms. Lewis presented an in-depth overhead review of the application including the Vicinity Map, Copy of LMO Section 16-4-102.B.4.b.i, and the applicant's narrative & exhibits. Based on the staff's Findings of Facts and Conclusions of Law, the LMO Official determines that the request for a variance should be **granted** to the applicant.

The subject parcel is located at 81 Pope Avenue in the newly created CR zoning district. The former zoning on this parcel did not allow hotels but under the new LMO and associated zoning map, hotels are permitted by condition in the CR zoning district. The applicant proposes to locate a hotel in the rear of the property and would like to have six guest rooms on the first floor of the hotel. The applicant also proposes a slight increase in the height of the proposed hotel. The applicant proposes up to 2% of the roof to be five feet above the sixty foot (60') height limit to allow for the elevator penthouse and an additional 15% of the roof to be two feet above the sixty foot (60') height limit to allow for the roof-top rooms.

The site is currently developed with a shopping center that includes a mix of retail shops and restaurants. The land surrounding the subject parcel includes a gas station, Coligny Villas and a small shopping center. Ms. Lewis reviewed the Findings of Fact and Conclusions of Law contained in the staff's report. Following the staff's presentation, Chairman North requested that the applicant make his presentation.

Mr. Rob Ponder, architect for the project, presented statements in support of the application. Mr. Ponder discussed several issues including the use, the density, and height of the building. Mr. Ponder also discussed By Right uses. Following the applicant's presentation, Chairman North requested public comments and the following were received:

- (1) Mr. Tom Crews, Chairman of the former LMO Rewrite Committee, stated that the reason the “no hotel rooms on the first floor” provision was included in the LMO was to foster pedestrian traffic, and that in this case, because the hotel is more than 75 feet from Pope Avenue, hotel rooms on the first floor would not create a pedestrian deadzone.
- (2) Mr. Jay Owen, Vice President of the Coligny Villas Board of Directors, stated that he believes the application will have an adverse effect on the Coligny Villas property. Mr. Owen stated his concern with noise from the pool and bar. The building height and activity level on the sixth floor of the hotel will cause problems and will be detrimental to property values.
- (3) Mr. Stan Deveen, resident of Coligny Villas, presented statements in opposition to the application due safety concerns with traffic, parking, and noise.

Following all public comments, Chairman North closed the public hearing and invited discussion by the Board. The Board discussed the application in depth. A couple of Board members stated their concern with the request for variance in density (the increase in number of rooms on the ground floor from six to eight rooms.)

Ms. Lewis stated that the Coligny District is unique in that there is no density limitation. There is no set limitation on the number of hotel rooms, dwelling units, or square footage. The density is controlled by such things as height limitations and parking requirements. The Board and the applicant discussed the building height and the density in depth. Following final discussion by the Board, Chairman North requested that a motion be made.

Mr. Wilson made a **motion** to **approve** application VAR-000939-2015 as presented based on the Findings of Fact and Conclusions of Law contained in the staff’s report. Mr. Cutrer **seconded** the motion and the motion **passed** with a vote of 6-0-0.

### **Public Hearing**

#### **VAR-001055-2015:**

John P. Qualey, Jr. is requesting a variance from Land Management Ordinance Sections 16-5-102.C, Adjacent Street Setback Requirements, 16-5-102.D Adjacent Use Setback Requirements, 16-5-103.D, Adjacent Street Buffer Requirements and 16-5-103.E, Adjacent Use Buffer Requirements in order to construct four single family homes within the existing adjacent use and adjacent street setbacks and setback angles and the adjacent use and adjacent street buffers. The property is located at 22 Bradley Circle and is further identified as parcel 22U on Beaufort County Tax Map 8. Acting Chairman North introduced the application, opened the public hearing, and requested that the staff make their presentation.

Ms. Teri Lewis made the presentation on behalf of staff. Staff recommended that the Board of Zoning Appeals **approve** application VAR-001055-2015 based on the Findings of Fact and Conclusions of Law contained in the staff’s report. Ms. Lewis presented an in-depth overhead review of the application including the Vicinity Map, the Site Plan and the Applicant’s submittal, and Letter of Opposition.

The subject parcel is located at 22 Bradley Circle. This parcel was rezoned from the RM-8 (Residential Moderate Density) district to the RD (Resort Development) zoning district on October 7, 2014 as part of the LMO rewrite process. This district has a maximum height of 75’ and a maximum density of 16 dwelling units per acre.

The property owner is proposing to subdivide the property into 4 single family lots for the purpose of renting them out as resort homes. The property is currently occupied by a single family home; this residence will be demolished before the four new homes are built. The property to the south contains Marriott's Surf Watch timeshare development, the property to the north and west contains single family homes and the property to the east contains five single family lots.

The applicant would like to reduce the adjacent use setback from 27 ft. to 15 ft. They would like to reduce the setback angle from 60 degrees to 75 degrees. The request for the reduction in setback angle is for three sides except for the tidal marsh side. Ms. Lewis presented a review of the elevations. Ms. Lewis presented the staff's Findings of Fact and Conclusions of Law. Following the staff's presentation, Chairman North requested that the applicant make his presentation.

Jack Qualey, Esq., presented statements in support of the application on behalf of his client. Mr. Qualey stated he believes that all of the requirements for a Variance have been met by the application. Mr. Qualey stated that the property owner exercised due diligence in purchasing the property and the implementation of case law being presented today will limit the owner's utilization of the property.

Following the applicant's presentation, Chairman North requested public comments and the following were received:

- 1) Ms. Tamra Becker, resident of Bradley Circle, presented statements in opposition to the application due to concerns with pedestrian and bicycle safety, aesthetics, and parking.
- 2) Mr. Ted Whitaker, resident of Bradley Circle, presented statements in opposition to the application due to the concerns already stated.
- 3) E. Richardson LaBruce, Esq., on behalf of CSB Development Company, Inc., presented statements in opposition to the application based on the need to comply with the Land Management Ordinance and the Comprehensive Plan.
- 4) Mr. Chris Abrens, property owner, presented statements in support of the application.

Following all public comments, Chairman North closed the public hearing and invited discussion by the Board. The Board discussed the application in depth, especially the issue of unnecessary hardship.

Chairman North, Mr. Hulbert, and Mr. Qualey discussed a Supreme Court case that may or may not be applicable to the application.

Mr. Hulbert stated that it is up to the Board to decide if there is unnecessary hardship associated with the application. Mr. Hulbert presented statements regarding the guidelines for determining hardship. Mr. Hulbert stated that the variance can only be granted if there is unnecessary hardship. In order for there to be unnecessary hardship the Board must find that each one of the four criteria has been met. Following final discussion by the Board, Chairman North requested that a motion be made.

Mr. Fingerhut made a **motion to disapprove** application VAR-001055-2015 based on the following Findings of Fact:

- (1) There are no extraordinary or exceptional conditions pertaining to the subject property.
- (2) Since there are no extraordinary or exceptional conditions, the subject property is not different from other properties in the vicinity.

- (3) The application of the LMO to the subject property does not effectively prohibit or unreasonably restrict the utilization of the property.
- (4) The granting of the variances would be detrimental to adjacent property and the public good based on the testimony of the public regarding the requested variances.

Mr. White **seconded** the motion and the motion **passed** with a vote of 4-2-0. Mr. Wilson was against the motion and Mr. Cutrer was against the motion.

### **Public Hearing**

#### **VAR-1077-2015:**

Katie Kabala with Atlantic States Management, on behalf of the Colonnade Club Board of Directors, is requesting a variance from Land Management Ordinance Section 16-6-104.F, Specimen Tree Preservation, to remove a specimen tree. The tree is located outside of 200 Colonnade Road, Unit 208, further identified as Beaufort County Tax Map parcel number R550 015 000 314E 0000. Acting Chairman North introduced the application, opened the public hearing, and requested that the staff make their presentation.

Ms. Anne Cyran made the presentation on behalf of staff. The staff recommended that the Board **approve** the application based on the Findings of Fact and Conclusions of Law contained in the staff's report with the following conditions: (1) the applicant shall apply for a Natural Resources Permit to remove the subject tree; and (2) the applicant shall plant four, Category I mitigation trees per LMO Section 16-6-104.I.3. Ms. Cyran presented an in-depth overhead review of the application including an aerial photo of the site and the applicant's narrative.

The Colonnade Club buildings were constructed in 1986 using plans approved by Beaufort County. Current LMO standards would not allow the construction of a building so close to a tree. Given the growth rate of magnolia trees, the subject tree, which is now 38 inches DBH, was probably not specimen size (30 DBH) at the time of construction.

In March 2015, the owner of Colonnade Club Unit 208 received a home inspection report stating that the subject Magnolia tree is pressing against the eaves of the home. The report advised the homeowner to have the tree and roof inspected and to take action to prevent structural damage to the roof.

Colonnade Club's regime management company, Atlantic States Management (ASM), hired Arbor Nature to inspect the tree. Arbor Nature reported that, since the trunk is within a few inches of the edge of the roof and within a foot of the building, there isn't enough room for the tree to continue to grow. Arbor Nature stated the only options are to remove the tree or to remove part of the building.

In April 2015, the applicant submitted a natural resources application to remove the tree. Rocky Browder, the Town's Environmental Planner, examined the tree and determined that it is healthy. He denied the application because removing a healthy specimen size tree would be a violation of LMO Section 16-6-104.F, Specimen Tree Preservation. He recommended that the applicant explore alternatives to removing the tree or to seek a variance per LMO Section 16-6-104.F.

In May 2015, the applicant submitted the request for a variance to remove the tree. Town staff met with the applicant and Arbor Nature to examine the tree. Staff recommended that the applicant explore the possibility of modifying the building to accommodate the tree instead of removing it.

In June 2015, the applicant hired Robert Fletcher, General Contractor and owner of PCT Services of Hilton Head, to determine if any alterations could be made to the building to preserve the tree. He

reported that making those alterations would require hiring an architect to redesign the building, obtaining required approvals and permits from Colonnade Club, Shipyard Plantation, and the Town of Hilton Head Island, renovating the exterior and interior of Units 207 and 208 to accommodate the change to the roof, and renovating the deck of Unit 207 to accommodate the trunk. Mr. Fletcher reported that these alterations would not, however, negate the damage that the root system of the tree will eventually put on the foundation of the building.

Based on Arbor Nature's and Mr. Fletcher's reports, the applicant determined that they must remove the tree to prevent future damage to the building. Ms. Cyran presented the Findings of Fact and Conclusions of Law contained in the staff's report. Following the staff's presentation, Chairman North requested that the applicant make her presentation.

Ms. Katie Kabala presented brief statements in support of the application. Following the applicant's presentation, Chairman North requested public comments and none were received. Chairman North then closed the public hearing and invited discussion by the Board. Following the Board's brief discussion, Chairman North requested that a motion be made.

Mr. Cutrer made a **motion to approve** application VAR-1077-2015 with the following conditions as recommended by staff: (1) the applicant shall apply for a Natural Resources Permit to remove the subject tree; and (2) the applicant shall plant four, Category I mitigation trees per LMO Section 16-6-104.I.3. Mr. White **seconded** the motion and the motion **passed** with a vote of 6-0-0.

**Public Hearing**  
**VAR-001204-2015:**

Greg Francese of Cuda Company Real Estate, on behalf of property owner Charles Lasky, is requesting a variance from Land Management Ordinance Section 16-6-102.D, Wetland Buffer Standards, in order to construct a patio and dock within the 20 foot tidal wetland buffer. The property is located at 8 Queens Way and is further identified as parcel 301 on Beaufort County Tax Map 16A. Acting Chairman North introduced the application, opened the public hearing, and requested that the staff make their presentation.

Ms. Nicole Dixon made the presentation on behalf of staff. The staff recommended that the Board **disapprove** the application, based on the Findings of Fact and Conclusions of Law contained in the staff's report.

The subject parcel is located at 8 Queens Way in Leamington, which is part of the Palmetto Dunes Resort Master Plan. The property is bound by a wetland on one side and single family residences on the other three sides.

The applicant is proposing to construct a brick patio and a 12 foot by 11 foot dock within the 20 foot wetland buffer. The wetland buffer is currently heavily vegetated. After speaking with a representative from the Leamington ARB, staff was made aware that the Leamington private covenants do not allow permanent pavers within 10 feet of the property line and the dock is only allowed to be 12 feet by 6 feet.

The applicant states in the narrative that the proposed patio will be an expansion of the existing brick patio which will lead up to the existing retaining wall and proposed dock. The applicant states that as the property owner is aging he is concerned about potential tripping hazards and wishes to have a safe path from the existing patio to the dock. Ms. Dixon presented the Findings of Fact and Conclusions of Law contained in the staff's report. The application does not meet the four criteria required in for a

variance. Following the staff's presentation, Chairman North requested that the applicant make his presentation.

Mr. Greg Francese, with Cuda Company Real Estate, the contractor for the project, presented statements on behalf of the property owner, Mr. Charles Lasky. Mr. Francese presented statements regarding the patio, the proposed dock, the retaining wall, and pavers. The applicant also discussed concerns with safe access and hardship. The applicant is looking for guidelines in the selection of materials for the proposed dock.

Following the applicant's presentation, Chairman North requested public comments and the following were received: (1) Ms. Leslie Howard presented statements in opposition to the application on behalf of the Leamington Property Owner's Association. Following public comments, Chairman North closed the public hearing and invited discussion by the Board.

The Board discussed the staff's recommendation for denial of the application. At the completion of their discussion, Chairman North recommended that, rather than deny the application today, the applicant should work with staff to achieve better compliance with the LMO.

Ms. Dixon stated that regardless of what is proposed at a later date, the applicant will still require a variance due to the encroachment into the wetland buffer. Ms. Dixon recommended that the application be tabled until the August meeting to give the applicant time to work with staff to revise the plan to be less intrusive in the wetland buffer. The Board agreed with the staff's recommendation. Following final comments by the Board, Chairman North requested that a motion be made.

Mr. Cutrer made a **motion to remand** application VAR-001204-2015 back to the staff for additional consideration. Mr. Wilson **seconded** the motion and the motion **passed** with a vote of 6-0-0.

## 12. Board Business

### Adoption of the revised Rules of Procedure

Chairman North requested that a motion be made for adoption of the revised Rules of Procedure. Mr. Fingerhut made a **motion to adopt** the revised Rules of Procedure as submitted by the staff. Mr. Wilson **seconded** the motion and the motion **passed** with a vote of 6-0-0.

## 13. Staff Reports

### Waiver Report

Ms. Dixon presented the Waiver report on behalf of staff.

## 14. Adjournment

The meeting was adjourned at 5:00p.m.

Submitted By:

Approved By:

\_\_\_\_\_  
Kathleen Carlin  
Secretary

\_\_\_\_\_  
Jeffrey North  
Acting Chairman



# TOWN OF HILTON HEAD ISLAND

*Community Development Department*

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**TO:** Board of Zoning Appeals  
**FROM:** Nicole Dixon, CFM, *Senior Planner*  
**DATE:** August 7, 2015  
**SUBJECT:** VAR-001204-2015 – 8 Queens Way

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At the July 27, 2015 Board of Zoning Appeals meeting, the application for variance (VAR-001204-2015) for 8 Queens Way for a proposed patio addition and dock within the wetland buffer was heard by the BZA. After discussions with staff and the applicant, the board decided to table the item until the August 24<sup>th</sup> meeting so that the applicant had time to work with staff to revise the plans to propose something with less impact to the wetland buffer.

The applicant has since worked with staff, as well as the Leamington ARB, and has come up with a plan that removes the original patio addition request and just proposes a 5 foot wide pervious paver pathway from the existing patio to the proposed 12 foot wide by 6 foot long dock. Please see attached revised narrative, revised plan and picture of proposed pavers.

The staff recommendation of denial has not changed because the findings of fact and conclusions of law for the variance criteria remain the same, but staff does find that the applicant did their best with minimizing the disturbance of the wetland buffer. Staff recommends that should the BZA decide to approve the application for variance, that there be a condition that the remaining portions of the wetland buffer, where there is currently sod, be planted with wetland vegetation.

8/5/15

To: Nicole Dixon  
Senior Planner  
Community Development Depart

Re: Lasky Residence - 8 Queens Way  
Variance Request

I am writing to request a Variance in the type of material that can be used to join an existing brick patio to a new dock to be constructed. The dock has been approved by DHEC ( permit # GP-11-SW-022(15) ). The pavers we would like to use are Pervious Pavers. We would be the General Contractor for the job.

I would like to address the concerns and criteria of LMO Section 16-2-103.S.4.a:

01. The main reason we ask to consider this Variance is really a matter of safety.

The owner is concerned about having a smooth access from the patio to the dock. He is concerned about avoiding a potential tripping hazard, especially as he gets older. Our interest is to provide a safe path to the new dock.

02. To the best of my knowledge, and my surveying the adjacent properties, this condition is unique to this area of the subdivision.

03. The application of this Ordinance would, in our belief, restrict access to the dock by the property owner.

04. The issuing of this Variance will not be a detriment to the adjacent properties or the public good. The pavers will not be visible to virtually anyone due to the tight location of the house and lagoon. There will be minimal removal of existing landscape, and to protect the wetland areas.

The type of paver is natural looking and will not stand out. The pavers will not be permanently installed.

The installation of the pavers would be in harmony with the existing vegetation and landscape.

We thank you for your time in considering this Variance.

On behalf of the property owners, Charles and Debbie Lasky;

Greg Francese

Cuda Company  
Acting Agent

Lasky Residence

8 Queens Way, Leamington, Palmetto Dunes

Scope of work:

Install Pervious Pavers from the existing patio to the new dock, approximately 5 feet wide and 10 feet long. Add 6 feet long and 12 wide deck over the lagoon.

Assure minimal disturbing of the wetland area during installation.



N

DRIVE WAY

8 QUEENS WAY

EXISTING BRICK PATIO

5' WIDE  
PERVIOUS PAVED

EXISTING RETAINING WALL

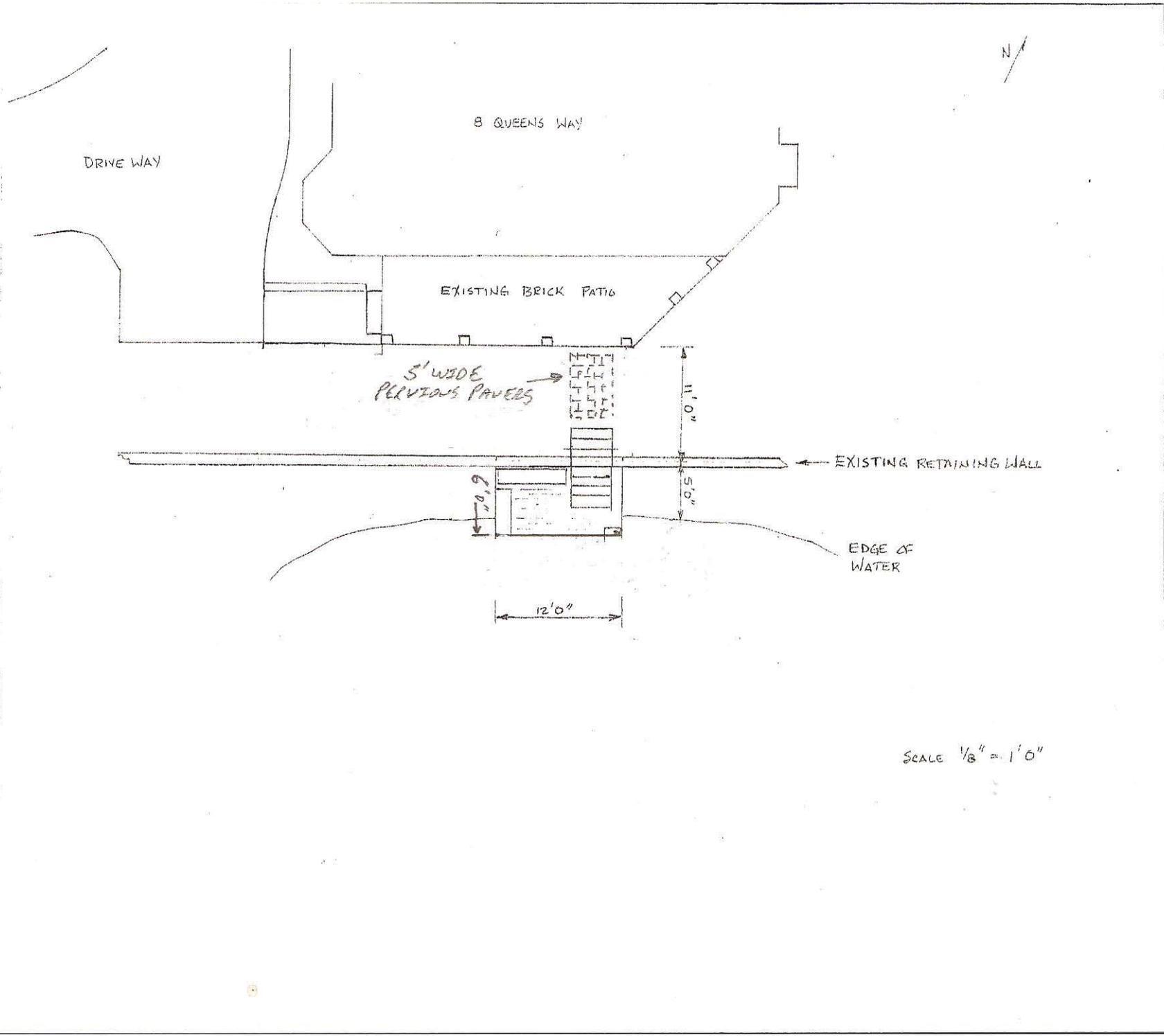
EDGE OF  
WATER

12'0"

11'0"

5'0"

SCALE 1/8" = 1'0"





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## TOWN OF HILTON HEAD ISLAND

### *Community Development Department*

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**TO:** Board of Zoning Appeals  
**VIA:** Nicole Dixon, CFM, *Senior Planner and Board Coordinator*  
**FROM:** Teri Lewis, *LMO Official*  
**DATE:** August 13, 2015  
**SUBJECT:** VAR 1055-2015 22 Bradley Circle – Petition for Reconsideration of Approval

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On July 31, 2015, staff received the attached Petition for Reconsideration of the denial of Variance applicant VAR 1055-2015 for 22 Bradley Circle. Per the BZA's Rules of Procedure, particularly Article IX, Section 1, Motion for a Reconsideration, any party aggrieved by a decision of the BZA may file a Petition for Reconsideration within five days from the date of the hearing. The applicant met this requirement. The Petition, in accordance with the Rules of Procedure, has stated the points the applicant believes were overlooked or misinterpreted by the Board. Additionally, more specific site plans have been submitted as well.

At the meeting on August 24, 2015, the Board will review the Petition for Reconsideration and hear from the applicant. The Board will then decide whether or not to grant the Petition for Reconsideration. The Motion to Grant the Petition for Reconsideration may only be made by a member of the Board who voted on the prevailing side (voted to deny) in the original vote. If the Motion for Reconsideration is granted, VAR 1055-2015 will be heard at the September 28, 2015 BZA meeting and it will be as though no previous vote had been taken on the application. A Motion to Deny the Petition for Reconsideration may be made by any member of the Board. The effect of a vote denying a Petition for Reconsideration is that the vote shall be considered to be the Board's final action on the matter.

# QUALEY LAW FIRM, P.A.

JOHN P. "JACK" QUALEY, JR.\*

\*also licensed in Georgia

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July 31, 2015

## BY HAND DELIVERY

Board of Zoning Appeals  
Town of Hilton Head Island  
1 Town Center Court  
Hilton Head Island, SC 29928  
Attention: Teri B. Lewis

Re: Petition for Reconsideration  
Variance Application # VAR-1055-2015 (Abreu)

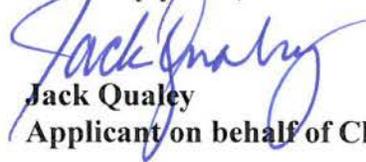
Dear Teri:

Enclosed is the Petition for Reconsideration in connection with the above matter. Included with it are additional copies of the Site Plan and the elevations showing in detail the requested variances, and I hereby request that the attached Site Plan and elevations be provided to each Board member for review with the Petition for Reconsideration.

Please let me know if any other information is needed in connection with this Petition by calling me at (843) 384-5225.

Thanks for your kind cooperation.

Sincerely yours,



Jack Qualey

Applicant on behalf of Christopher Abreu

## PETITION FOR RECONSIDERATION

(CASE # VAR-1055-2015, 22 BRADLEY CIRCLE)

In accordance with the Board of Zoning Appeals' Rules of Procedure, the Applicant, John P. Qualey, Jr., in connection with VAR-1055-2015, hereby petitions the Board of Zoning Appeals to reconsider the decision of the Board to disapprove the application for variances.

This Petition for Reconsideration is based upon the following points which were overlooked or misinterpreted by the Board in reaching its decision:

The Board clearly misinterpreted LMO Section 16-2-103.S.4, Variance Review Standards, and the criteria to be applied in determining whether to grant variances. A copy of LMO Section 16-2-103.S.4 is attached, and the Petitioner believes that the Board misinterpreted or incorrectly applied the Ordinance, perhaps because it was misled by the repeated references by Mr. North to the Restaurant Row Associates v. Horry County case, a copy of which is attached and which involved an "adult entertainment establishment" which violated the Horry County zoning ordinance as a non-conforming use. As Brian Hulbert repeatedly stated to Mr. North, that case was decided in 1997, and it stands for the proposition that certain criteria must be applied when determining whether a variance may be granted. Contrary to what Mr. North asserted and as Mr. Hulbert repeatedly stated, the Restaurant Row decision does not stand for the proposition that a variance may not be granted in this situation. LMO Section 16-2-103.S.4 was adopted subsequent to the Restaurant Row decision, and it contains the very same criteria which the South Carolina Supreme Court stated must be followed when analyzing whether or not to grant a variance.

The Petitioner believes that the Board became confused and disregarded the requirement that it apply the criteria of the LMO, because of Mr. North's repeated misinterpretation of the effect of the Restaurant Row case. Therefore, the Petitioner requests that the Board reconsider its decision and carefully apply such criteria to the application in question. The Staff Report to the Board analyzed the criteria in question and unequivocally determined that the criteria were met, and the Petitioner requests that the Board make the same careful analysis, which should lead to the very same conclusion.

The Town's website defines a "Variance" as "a change from the strict enforcement of any design or performance standard that would result in an unnecessary hardship to the applicant and that by granting the variance, the spirit of the law will be observed, public welfare and safety will not be diminished and substantial justice will be done." That is all the Petitioner is requesting -- that substantial justice be done, and it certainly appears to be unjust for the variances to be denied in this case, when:

1. The Town Staff has determined that all of the variance criteria for this application have been met (see attached Staff Report).

2. The variances sought are from design or performance standards (setbacks, setback angles and buffers) which will create an unnecessary hardship to the Applicant, as shown on the attached drawings, which should more clearly confirm to the Board how the standards in question will “unreasonably restrict the utilization of the property” (LMO Section 16-2-103.S.4.a.i.03). The attached plans show exactly how the proposed 4 single family dwellings would be adversely affected by the imposition of the setbacks, setback angles and buffers that are now required in the LMO. The property owner did not “create” these standards, nor did he cause the adverse effect of the standards. As in the case of every property owner who seeks a variance, this property owner simply wants to fully utilize his property and seeks a change from strict enforcement of certain design or performance standards. This is no different from any other variance application, and it should not have been treated differently by the Board when it reached its decision.

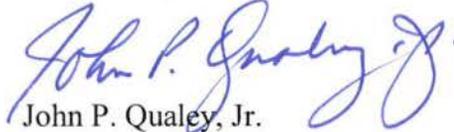
3. If the Board believed the assertion made by attorney Richardson LaBruce in his letter objecting to the application that the property owner must establish a “change in circumstances or conditions that occurred subsequent to the purchase of the property that would render the enforcement of the validly existing zoning ordinance as an unnecessary hardship,” then the Board misinterpreted the criteria for a variance, because there is no such requirement in the LMO that the Applicant establish a “change in circumstances or conditions that occurred subsequent to the purchase of the property.” As stated above, it is common for property owners who buy property to seek variances from design or performance standards that existed at the time the property was acquired, and, in this case, Teri Lewis admitted that the Town Staff met with the property owner a number of times before and after his purchase of the property to discuss the design/performance standards applicable to this property, which changed when the new LMO was adopted in 2014.

3. With regard to the Town’s stated intention on its website that “substantial justice be done,” the Petitioner would be remiss if he failed to point out to the Board that it would be unjust for the Board to grant a variance, as it did in the case of the hotel at 81 Pope Avenue, but not grant the variances in connection with this application. In connection with the hotel variance, the Board did not mention even once the requirement that the hotel applicant demonstrate an unnecessary hardship, yet it scrutinized this application and voted to deny it on that basis. In the case of the hotel, the Board didn’t grant a variance from “design or performance standards.” Instead, it granted a “variance” from the provision of a Town Ordinance disallowing 6 guest rooms on the ground floor of the hotel, and in doing so, it essentially re-wrote the Ordinance to remove that limitation, which far exceeded the BZA’s authority (as Mr. Fingerhut correctly pointed out). Certainly, it appears to be unjust and unfair for the Board to apply completely different standards to the two variance applications, and the Board should recognize and admit that it misinterpreted the applicable variance requirements when dealing with the two applications. Consequently, it should vote to reconsider this application.

Therefore, the Applicant/Petitioner hereby petitions the Board of Zoning Appeals to reconsider its decision in this matter.

Signed and delivered to the Town of Hilton Head Island this 31<sup>st</sup> day of July, 2015.

Respectfully submitted,

A handwritten signature in blue ink that reads "John P. Qualey, Jr." with a stylized flourish at the end.

John P. Qualey, Jr.  
Applicant/Petitioner  
P.O. Box 10  
Hilton Head Island, SC 29938  
(843) 785-3525

## **LMO Section 16-2-103.S.4**

### 4. Variance Review Standards

#### a. Required Findings

##### i.

A Variance may be granted by the Board of Zoning Appeals if it concludes that the strict enforcement of any appropriate dimensional, development, design, or performance standard set forth in this Ordinance would result in unnecessary hardship. A Variance may be granted in an individual case of unnecessary hardship if the Board of Zoning Appeals determines and expresses in writing all of the following findings:

##### 01.

There are extraordinary and exceptional conditions pertaining to the particular piece of property;

##### 02.

These conditions do not generally apply to other properties in the vicinity;

##### 03.

Because of these conditions, the application of this Ordinance to the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property; and

##### 04.

The authorization of the Variance will not be of substantial detriment to adjacent property or the public good, and the character of the zoning district where the property is located will not be harmed by the granting of the Variance.

##### ii.

In its consideration of an application for a Variance, the decision-making body shall be guided by this Ordinance, the relevant provisions of the South Carolina Local Government Comprehensive Planning Enabling Act of 1994, and the decisions of the appellate courts of South Carolina interpreting such provisions.



## TOWN OF HILTON HEAD ISLAND COMMUNITY DEVELOPMENT DEPARTMENT

One Town Center Court

Hilton Head Island, SC 29928

843-341-4757

FAX 843-842-8908

### STAFF REPORT VARIANCE

Case #:	Public Hearing Date:	Development Name:
VAR-1055-2015	June 22, 2015	22 Bradley Circle Resort Homes

#### Parcel Data:

Address: 22 Bradley Circle  
Parcel: R510 008 000 022U 0000  
Acreage: .916 gross acres, .499 net acres  
Zoning: RD (Resort Development)

<b>Property Owner:</b>	Christopher Abreu 70 Somersby Way Farmington CT 06032
<b>Applicant:</b>	John P. Qualey, Jr. P.O. Box 10 Hilton Head Island, SC 29938
<b>Agent:</b>	Same as above

#### Application Summary:

John P. Qualey, Jr., on behalf of Christopher Abreu, is requesting a variance from the following Sections of the Land Management Ordinance (LMO):

- 16-5-102.C. Adjacent Street Setback Requirements
- 16-5-102.D. Adjacent Use Setback Requirements
- 16-5-103.D. Adjacent Street Buffer Requirements

**Staff Recommendation:**

Staff recommends the Board of Zoning Appeals **approve** the application based on the Findings of Fact and Conclusions of Law contained in the staff report.

**Background:**

The subject parcel is located at 22 Bradley Circle. This parcel was rezoned from the RM-8 (Residential Moderate Density) district to the RD (Resort Development) zoning district on October 7, 2014 as part of the LMO rewrite process. This district has a maximum height of 75' and a maximum density of 16 dwelling units per acre. The property owner is proposing to subdivide the property into 4 single family lots for the purpose of renting them out as resort homes. The property is currently occupied by a single family home; this residence will be demolished before the four new homes are built. The property to the south contains Marriott's Surf Watch timeshare development, the property to the north and west contains single family homes and the property to the east contains five single family lots.

**Applicant's Grounds for Variance, Summary of Facts and Conclusion of Law:**

**Grounds for Variance:**

- A variance is required because the applicant would like to reduce the adjacent use setback and adjacent use setback angle on the south side of the property. The required adjacent use setback on the south side is 30' and the required adjacent use setback angle on the south side is 60 degrees. Per Note 5 under Table 16-5-102.D, the required adjacent use setback of 30' may be reduced by 10% to 27' if the applicant meets six conditions. Staff has determined that the applicant meets the conditions necessary to receive the reduction in the adjacent use setback. The property owner has stated that the application of the 27' adjacent use setback and the 60 degree setback angle on the south side of the property will result in the loss of significant portions of several floors on the home located on the south side. The applicant is seeking a variance to reduce the required adjacent use setback from 27' to 15' and to reduce the setback angle from 60 degrees to 75 degrees.
- A variance is required because the applicant would like to reduce the adjacent street setback angle on the west side of the property. The required adjacent street setback angle on the west side is 60 degrees. The property owner has stated that the application of the 60 degree setback angle on the west side of the property will result in the loss of portions of the home located on the west side. The applicant is seeking a variance to reduce the setback angle from 60 degrees to 75 degrees.
- A variance is required because the applicant would like to reduce the adjacent street setback, the adjacent street setback angle and the adjacent street buffer on the north side of the property. Due to the fact that this is a corner lot, the required setback from Terra Bella Trace is 10'. Per Note 4 under Table 16-5-102.C, the required adjacent street setback of 10' may be reduced by 20% to 8' if the applicant meets six conditions. Staff has determined that the applicant meets the conditions necessary to receive the reduction in the adjacent street setback. Although the applicant is

showing an 8 foot setback on their submitted site plan, the setback, per LMO Table 16-5-102.C.1, must be measured from the easement line to the closest portion of the structure; therefore they only have 5 feet between the edge of the easement and the structure. The required adjacent street setback angle on the north side is 60 degrees. The property owner has stated that the application of the 60 degree setback angle on the north side of the property will result in the loss of portions of the home located on the north side. The required adjacent street buffer is 10'. Per Note 6 under Table 16-5-103.F, the required adjacent street setback of 10' may be reduced by 20% to 8' if the applicant meets six conditions. Staff has determined that the applicant meets the conditions necessary to receive the reduction in the adjacent street buffer. There is only 5' of buffer between the edge of the easement and the structure. The applicant is seeking a variance to reduce the adjacent street setback angle from 60 degrees to 75 degrees, reduce the adjacent street setback from 8' to 5' and to reduce the adjacent street buffer from 8' to 5'.

**Summary of Facts:**

- The applicant seeks a variance as set forth in LMO Section 16-2-103.S.

**Conclusion of Law:**

- The applicant may seek a variance as set forth in LMO Section 16-2-103.S.

**Summary of Facts and Conclusions of Law:**

**Summary of Facts:**

- Application was submitted on May 22 2015 as set forth in LMO Section 16-2-102.C and Appendix D-23.
- An update to the application was submitted on June 26, 2015.
- Notice of the Application was published in the Island Packet on July 5, 2015 as set forth in LMO Section 16-2-102.E.2.
- Notice of the Application was posted on July 9, 2015 as set forth in LMO Section 16-2-102.E.2.
- Notice of Application was mailed on July 9, 2015 as set forth in LMO Section 16-2-102.E.2.
- The Board has authority to render the decision reached here under LMO Section 16-2-102.G.

**Conclusions of Law:**

- The application is in compliance with the submittal requirements established in LMO Section 16-2-102.C.
- The application was submitted 31 days prior to the meeting, therefore meeting the 30 day deadline required in the LMO.
- Notice of application was published 23 days prior to the meeting, therefore meeting the 15 day deadline required in the LMO.
- Notice of application was posted 18 days prior to the meeting, therefore meeting the

15 day deadline required in the LMO.

- Notice of application was mailed 18 days prior to the meeting, therefore meeting the 15 day deadline required in the LMO.
- The application and notice requirements comply with the legal requirements established in LMO Section 16-2-102.E.2.

*As provided in LMO Section 16-2-103.S.4, Variance Review Standards, a variance may be granted in an individual case of unnecessary hardship if the Board determines and expresses in writing all of the following findings of fact.*

#### Summary of Facts and Conclusions of Law:

*Criteria 1: There are extraordinary and exceptional conditions pertaining to the particular piece of property (LMO Section 16-2-103.S.4.a.i.01):*

#### Findings of Fact:

- The subject property is bound on the south side by the Marriott Surf Watch project which is classified in the LMO as Resort Accommodations and on the north side by Terra Bella Trace, an access easement.
- A new LMO was adopted on October 7, 2014. There were two changes made that directly affect the subject project. A requirement was added that setback, setback angles and buffers are required from an access easement and an adjacent use setback angle is required for single family homes.

#### Conclusions of Law:

- Staff concludes that this request **meets the criteria** as set forth in LMO Section 16-2-103.S.4.a.i.01 because there are extraordinary and exceptional conditions that pertain to this particular property.
- The location of the subject property adjacent to a Resort Accommodations use creates an exceptional condition because the difference in use types requires that a greater adjacent use setback be provided on the portion of the property that borders the Surf Watch property.
- An adjacent use setback angle would not have previously been required on this property.
- Setbacks, setback angles and buffers are now required from access easements under the new LMO; in the previous LMO, setbacks and setback angles were measured from the property line rather than from the access easement. If the applicant were able to still measure the setback from the property line, the required setback would be 75 degrees instead of 60 degrees and the applicant would not need to apply for a variance.

**Summary of Facts and Conclusions of Law:**

*Criteria 2: These conditions do not generally apply to other properties in the vicinity (LMO Section 16-2-103.S.4.a.i.02):*

**Findings of Fact:**

- The majority of the adjacent and nearby parcels are developed as single family homes.
- The required adjacent use setback between two Single Family uses is 20'. The required adjacent use setback angle is 75 degrees.
- The subject property is surrounded by two streets, a resort accommodations use and a wetland.

**Conclusions of Law:**

- Staff concludes that this request **meets the criteria** as set forth in LMO Section 16-2-103.S.4.a.i.02 because these conditions do not generally apply to other properties in the vicinity.
- With the exception of the Surf Watch project, the remaining parcels are all developed with single family uses. This means that their setback is 10' less than what is required for the subject property. Additionally the setback angle for the adjacent and nearby properties is 75 degrees which is a difference of 15 degrees between what is required for the subject property on the south side.
- The three other properties in the area that were developed adjacent to access easements developed under the old LMO and therefore did not have setback and setback angle requirements from an access easement.
- Many of the properties in this area are only bound by a single street; additionally those other properties are also surrounded by single- family, rather than resort accommodations uses.

**Summary of Facts and Conclusions of Law:**

*Criteria 3: Because of these conditions, the application of this Ordinance to the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property (LMO Section 16-2-103.S.4.a.i.03):*

**Findings of Fact:**

The applicant's narrative states that the inability to develop the property with the requested variances will unreasonably restrict the utilization of the property because it places setbacks, buffers and setback angles on this property that are not applicable to other properties in the vicinity.

**Conclusions of Law:**

- Staff concludes that this request **meets the criteria** as set forth in LMO Section 16-2-103.S.4.a.i.03 because the application of this Ordinance to the subject property would unreasonably restrict the utilization of the property compared to other properties in the vicinity.

**Summary of Facts and Conclusions of Law:**

*Criteria 4: The authorization of the Variance will not be of substantial detriment to adjacent property or the public good, and the character of the zoning district where the property is located will not be harmed by the granting of the Variance (LMO Section 16-2-103.S.4.a.i.04):*

**Findings of Fact:**

- Staff found no evidence that reducing the adjacent use setback by 12 feet, the adjacent street buffer by 3 feet and the setback angle from 60 degrees to 75 degrees would have a negative effect on adjacent property.

**Conclusions of Law:**

- Staff concludes that this request **meets the criteria** as set forth in LMO Section 16-2-103.S.4.a.i.04.
- The reduced setback, setback angle and buffer should have no effect on the adjacent property or the public good, and the character of the zoning district will not be affected by granting the variance.

**LMO Official Determination:**

Based on the above Findings of Facts and Conclusions of Law, the LMO Official determines that the request for a variance **should be granted** to the applicant.

**BZA Determination and Motion:**

The "powers" of the BZA over variances are defined by the South Carolina Code, Section 6-29-800, and in exercising the power, the BZA may grant a variance "in an individual case of unnecessary hardship if the board makes and explains in writing ..." their decisions based on certain findings or "may remand a matter to an administrative official, upon motion by a party or the board's own motion, if the board determines the record is insufficient for review."

This State law is implemented by the Hilton Head Island Land Management Ordinance, Chapter 2, Article 103 and the Rules of Procedure for the BZA.

A written Notice of Action is prepared for each decision made by the BZA based on findings of fact and conclusions of law.

**The BZA can either Approve the application, Disapprove the application, or Approve with Modifications. Findings of Fact and Conclusions of Law must be stated in the determination.**

**PREPARED BY:**

TBL  
Teri B. Lewis, LMO Official

7/13/15  
DATE

**REVIEWED BY:**

ND  
Nicole Dixon, CFM, Board Coordinator

7-14-15  
DATE

**REVIEWED BY:**

HC  
Heather Colin, AICP, Development Review  
Administrator

7-13-15  
DATE

**ATTACHMENTS:**

- A) Vicinity Map
- B) Applicant's Submittal
- C) Letter of Opposition

Town of Hilton Head Island Municipal Government Website

# Variations



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**What is a Variance?**

A variance is a change from the strict enforcement of any design or performance standard that would result in unnecessary hardship to the applicant and that by granting the variance, the spirit of the law will be observed, public welfare and safety will not be diminished and substantial justice will be done.

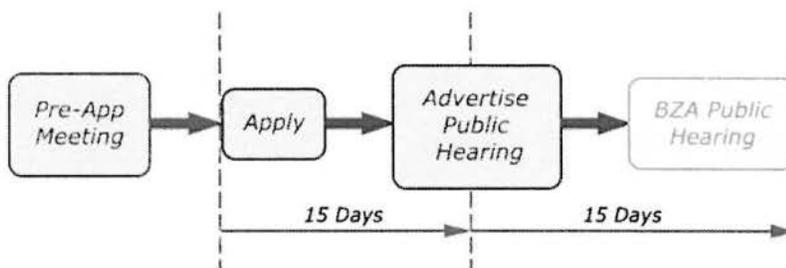
**Who may apply?**

The owner, developer or responsible agent shall initiate a request for a variance.

**When to apply?**

Complete applications must be submitted at least 30 days before the Board of Zoning Appeals (BZA) meeting. See the [BZA schedule](#) for meetings and application deadlines.

## General Variance Timeline and Process



*Note: Time is measured in calendar days*

## How to apply for a Variance

**Hard Copy:** Complete and submit the [Variance Application](#).

**Staff at Town Hall will assist with the following:**

- Assign a Project Manager to oversee the application process.
- Coordinate with the applicant regarding the Public Hearing date and status of application.
- Notify the public of the Public Hearing through an advertisement in the newspaper and by posting a sign on the property.
- Prepare a report listing Staff's recommendation to the [Board of Zoning Appeals](#).

**Applicant is responsible for and is required by law to...**

1. Submit a narrative and other information necessary for the [Board of Zoning Appeals](#) to make a determination regarding the request, including, but not limited to the following:
  - A site plan at a scale 1"=30' accurately showing the variance(s) requested.
  - Certification, written and signed by the site owner of record, that such owner formally consents to the proposed development.
  - A written narrative explaining in detail the variance(s) requested and how the criteria apply to the request.
  - Any supporting documentation deemed necessary by the applicant.
  - Notices to property owners within 350 feet regarding the Public Hearing date and time.
2. [Review Fee](#)
3. Instructions for the Public Hearing Notice to be sent to nearby property owners:
  - Addresses are listed with the [Beaufort County Tax Assessor's office](#) in Beaufort (843) 470-2522.
  - Must be certified mailed at least 15 days before the public hearing; and,
  - Must include the date, time and location of the public hearing. It is also recommended that details of the request be included.

## Criteria for Approval of Variations

- A variance may be granted by the [Board of Zoning Appeals](#) if the Board concludes that the strict enforcement of any design and performance standard would result in unnecessary hardship to the applicant and that by granting the variance, the spirit of the law will be observed, public welfare and safety will not be diminished and substantial justice done. A variance may be granted in an individual case of unnecessary hardship if the Board determines all of the following findings:
- There are extraordinary and exceptional conditions pertaining to the particular piece of property;

- These conditions do not generally apply to other properties in the vicinity;
- Because of these conditions, the application of this Ordinance to the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property; and
- The authorization of the Variance will not be of substantial detriment to adjacent property or the public good, and the character of the zoning district where the property is located will not be harmed by the granting of the Variance.

## Limitations

The Board may not grant a variance, the effect of which would be any of the following:

- to permit a use of land or a structure that is not allowed in the applicable district;
- to allow the physical extension of a nonconforming use;
- to increase the density of a use above that permitted by the applicable district;
- to vary the sign regulations; or
- fact that property may be utilized more profitably, should a variance be granted.

## Action by the Board of Zoning Appeals

- After review of the special exception application and the public hearing, the [Board of Zoning Appeals](#) will make a written finding and give its approval; approval with modifications or conditions; or disapproval to the variance request.
- Once BZA has made their decision, the Project Manager will notify the applicant.
- If approved, or approval with modifications or conditions is granted, the applicant is authorized to submit a development plan application.

Please refer to Section 16-2-103.S of the [LMO](#) for more details.

[Hardcopy Application Forms](#)

For questions regarding this procedure, please contact the [Community Development Information Center](#) at (843) 341-4757.

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## RESTAURANT ROW ASSOCIATES v. HORRY COUNTY

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### Court of Appeals of South Carolina.

**RESTAURANT ROW ASSOCIATES and The Afterdeck, Inc., d/b/a Thee DollHouse,  
Respondent/Appellant, v. HORRY COUNTY, a Political Subdivision of the State of  
South Carolina, Appellant/Respondent.**

**No. 2673.****Decided: June 9, 1997**

John P. Henry and Emma Ruth Brittain, both of The Thompson Law Firm, Conway, for appellant/respondent. William D. Hanna, Jr., of Harris & Hanna, Surfside Beach; and Luke Charles Lirot, of Lirot & Dolan, Tampa, FL, for respondent/appellant.

Restaurant Row Associates and The Afterdeck, Inc., d/b/a Thee DollHouse ("Thee DollHouse"), an adult entertainment establishment located in Horry County, brought this action on November 16, 1994, appealing the denial of its request for a variance from the Horry County Adult Entertainment Zoning Ordinance, Ordinance 92-89, by the Horry County Board of Adjustments and Zoning Appeals ("the Board"). The circuit court reversed the Board on the ground that its decision was arbitrary and capricious. Both parties appeal from the circuit court's order. We affirm in part and reverse in part.

#### FACTS

Thee DollHouse commenced its business as an adult entertainment establishment in the area near the city of Myrtle Beach known as "the Grand Strand" in March 1988. Thee DollHouse is a business featuring entertainment in the form of recorded music and exotic dance performances by female dancers who are sometimes topless. The business also serves alcoholic beverages and offers a light dinner menu.

On September 30, 1989, a year and a half after Thee DollHouse commenced business, Horry County adopted Ordinance 92-89, which established adult entertainment zoning regulations. Under Ordinance 92-89, now

codified in the Horry County Zoning Code as Section 526, businesses existing at the time of the ordinance's enactment that were in violation of the ordinance were granted a six-year amortization period in which to recoup their investments and seek other locations should they desire to continue as an adult use.

Thee DollHouse is a nonconforming use under the ordinance because it is located 350 feet from a residential district and therefore violates the requirement prohibiting the location of an adult entertainment establishment within 500 feet of a residential district. The residential district in question is occupied by a golf course and contains no residences. The business is separated from this zoning district by the Atlantic Intracoastal Waterway.

On January 6, 1994, the Horry County Zoning Administrator wrote to Thee DollHouse, advising it that it was an "adult use" as defined by the County's Adult Use Zoning Regulations, and that its nonconforming use of the property would have to cease on or before January 1, 1995. Thee DollHouse responded by filing three separate petitions with the Board. The first challenged the strict definition of "Adult Cabaret" as used in the ordinance. The second alleged that Ordinance 26-90, an ordinance passed after 92-89, effectively grandfathered in Thee DollHouse's adult use. The third petition requested a variance from the setback and amortization provisions of 92-89 based in part on the fact that the only residential property that rendered Thee DollHouse "nonconforming" was a golf course located at least 350 feet across the Atlantic Intracoastal Waterway.

The Board heard the petitions on September 12, 1994. In the course of the Board's hearing of Thee DollHouse's petition for the variance, the Board received a staff report prepared by the Horry County Zoning Administrator. The report stated that Thee DollHouse had to meet the four criteria found in S.C.Code Ann. § 6-7-740(2) and in Horry County Ordinance 23-87. The Zoning Administrator made no recommendation to approve or deny the variance application.

R. Bruce McLaughlin, AICP, a consultant, testified for Thee DollHouse. He reviewed his credentials for the Board and was qualified as an expert in the field of land use planning. McLaughlin proceeded to offer extensive testimony, including a written report, supporting Thee DollHouse's claim that it met the variance criteria. The Board also heard comments from several members of the public before McLaughlin made some final rebuttal comments.

After hearing all the evidence, the Board denied Thee DollHouse's request for a variance as well as its other two petitions.

Thee DollHouse then appealed to the circuit court, which heard the three consolidated appeals on January 12, 1995.<sup>1</sup> The circuit court held Horry County Ordinance 26-90 did not grandfather in adult uses, but further held that the denial of Thee DollHouse's variance request was "arbitrary and clearly erroneous in light of the lack of any residence on the golf course and the natural barrier created by the Intracoastal Waterway." The court also noted the following facts: (1) the nearest residence is located over 1600 feet away; (2) Thee DollHouse is opposite a four-lane highway and major traffic artery; and (3) Thee DollHouse does not appear to adversely affect the surrounding neighborhood's crime rate, property values, or general quality of life.

#### THE COUNTY'S APPEAL

The County argues the circuit court erred in reversing the Board's denial of the variance, arguing the Board correctly found Thee DollHouse failed to prove an unnecessary hardship.<sup>2</sup> We agree.

A zoning board's findings of fact are final and conclusive on appeal. *Bishop v. Hightower*, 292 S.C. 358, 356 S.E.2d 420 (Ct.App.1987). Appeal to the circuit court is only for a determination of whether the board's decision is correct as a matter of law. *Id.*; S.C.Code Ann. § 6-7-780 (1976). On appeal from the circuit court, the Zoning Board's decision should not be interfered with "unless it is arbitrary or clearly erroneous." *Bishop*, 292 S.C. at 360, 356 S.E.2d at 421.

The statutory authority of the Board to grant a variance is governed by S.C.Code Ann. § 6-7-740 (1976 & Supp.1996), which provides as follows:

The board of appeals shall have the following powers:

\* \* \* \* \*

(2) To authorize upon appeal in specific cases a variance from the terms of the ordinance or resolution as will not be contrary to the public interest where, owing to special conditions, a literal enforcement of the provisions of the ordinance or resolution will, in an individual case, result in unnecessary hardship, so that the spirit of the ordinance or resolution shall be observed, public safety and welfare secured, and substantial justice done. Such variance may be granted in such individual case of unnecessary hardship upon a finding by the board of appeals that:

(a) There are extraordinary and exceptional conditions pertaining to the particular piece of property in question because of its size, shape, or topography, and

(b) The application of the ordinance or resolution of this particular piece of property would create an unnecessary hardship, and

(c) Such conditions are peculiar to the particular piece of property involved, and

(d) Relief, if granted, would not cause substantial detriment to the public good or impair the purposes and intent of the ordinance or resolution or the comprehensive plan, provided, however, that no variance may be granted for a use of land or building or structure that is prohibited in a given district by ordinance or resolution.

The County specifically adopted this statutory language in Section 1204(B) of its zoning ordinance. Thee DollHouse, as the variance applicant, bore the burden of establishing the existence of each of the four criteria set forth in Section 6-7-740 for a variance to be granted. *Simmons v. Board of Adjustment*, 226 S.C. 459, 85 S.E.2d 708 (1955).

Practical difficulty or unnecessary hardship, to ground a variance, is not mere hardship, inconvenience, interference with convenience or economic advantage, disappointment in learning that land is not available for business uses, financial or pecuniary hardship or disadvantage, loss of prospective profits, prevention of an increase of profits, or prohibition of the most profitable use of property. And it is not per se a sufficient reason for a variance that a nonconforming use is more profitable to the landowner, or that his land is better adapted for a forbidden use than for the one which is permitted.

*McQuillin Mun. Corp.*, § 25.168 (3rd ed. 1991) (footnotes omitted); see *Simmons*, 226 S.C. 459, 85 S.E.2d 708 (financial disadvantage in property value and income to single property owner from application of zoning restrictions does not constitute an "unnecessary hardship"); *Pike v. Zoning Board of Appeals*, 31 Conn.App. 270, 624 A.2d 909 (1993) (mere decrease in property value or other financial loss will not ordinarily constitute

“hardship” sufficient to mandate issuance of a variance; financial impact must be such that zoning board could reasonably find that application of regulations to property greatly decreases or practically destroys its value for any of the uses to which it could reasonably be put and where regulations, as applied, bear so little relationship to purposes of zoning that, as to particular premises, regulations have a confiscatory or arbitrary effect); *Lee v. Board of Adjustment*, 226 N.C. 107, 37 S.E.2d 128 (1946) (deprivation of better earning by means of nonconforming use does not constitute an “unnecessary hardship”).

Here, Thee DollHouse presented no evidence suggesting there was no feasible conforming use for the land in question.<sup>3</sup> The burden of proof in the proceeding before the Board was totally on the applicant, Thee DollHouse. Neither the County nor any other person had to prove that there was a feasible conforming use for the land. The Board was therefore correct to find that Thee DollHouse failed to prove an unnecessary hardship and, consequently, the circuit court erred in reversing the Board.

#### THEE DOLLHOUSE'S APPEAL

In its cross-appeal, Thee DollHouse argues the circuit court erred in concluding that County Ordinance 26-90, which amended certain subsections of § 500 of the County's zoning ordinance, repealed the amortization period established in § 526.2J of Ordinance 92-89, and therefore grandfathered in all nonconforming adult entertainment uses. We disagree.

It is well settled that, when interpreting an ordinance, legislative intent must prevail if it can be reasonably discovered in the language used. *Charleston County Parks and Rec. Comm'n v. Somers*, 319 S.C. 65, 459 S.E.2d 841 (1995). An ordinance must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers. *Id.* The determination of legislative intent is a matter of law. *Id.*

Repeals by implication are not favored by courts and to repeal a statute because of an asserted conflict or repugnancy with another statute, “the repugnancy must not only be plain, but the provisions of the two statutes must be incapable of any reasonable reconciliation; for if they can be construed so that both can stand, the Court will so construe them.” *City of Rock Hill v. SCDHEC*, 302 S.C. 161, 167, 394 S.E.2d 327, 331 (1990). “As a general rule, a statute of a specific nature is not to be considered as repealed in whole or in part by a later general statute, unless there is direct reference to the former or the intent of the legislature to repeal it is explicitly implied therein.” *Spartanburg County DSS v. Little*, 309 S.C. 122, 125, 420 S.E.2d 499, 501 (1992).

Section 500, as originally enacted in 1987, provided in pertinent part:

#### 500. Nonconforming Buildings or Uses

Nonconforming buildings or land uses are declared by this Ordinance to be incompatible with permitted uses in the Districts involved. However, to avoid undue hardship, the lawful use of any buildings or land uses at the time of enactment or amendments of this Ordinance may be continued even though such use does not conform with the provisions of the Ordinance except that the nonconforming building or land use shall not be:

500.1 Changed to another nonconforming use;

500.2 Enlarged or altered in excess of an additional twenty (20%) percent of existing floor area, in a way which increases its nonconformity provided that it meets the requirements for the district. Such

enlargements may be made one time only.

500.3 Nothing in this section shall be deemed to prevent the strengthening or restoring to a safe condition any building or part thereof declared to be unsafe by an official charged with protecting the public safety, upon order of such official.

In 1989, the Adult Entertainment Establishment Ordinance 92-89 was adopted and was codified as § 526 of the County Code. Section 526.2J of Ordinance 92-89 provided an amortization schedule for all nonconforming adult entertainment establishments at the time of the adoption of the ordinance. It specified a six-year amortization schedule running from September 30, 1989, until January 1, 1995.<sup>4</sup>

Section 500 of the original zoning ordinance was then amended by Ordinance 26-90 in 1990, to provide as follows:

#### 500. Nonconforming Buildings or Uses

Nonconforming buildings or land uses are declared by this ordinance to be incompatible with permitted uses in the Districts involved. However, to avoid undue hardship, the lawful use of any buildings or land uses at the time of enactment or amendments of this Ordinance may be continued even though such use does not conform with the provisions of the Ordinance except as follows:

500.1 The nonconforming building or land shall not be changed to another nonconforming use.

#### 500.2 ENLARGEMENTS AND ALTERATIONS

A. The nonconforming building, if it houses an allowed land use, may be enlarged or altered to any degree provided that the enlargement or alteration meets all setbacks and other requirements of the district.

B. Any building or structure, conforming or nonconforming, which houses a nonconforming land use shall not be enlarged or altered in excess of twenty (20%) percent of existing floor area. The twenty (20%) percent expansion can only occur if all applicable district requirements (setbacks, height restrictions, etc.) are met. If not, the twenty (20%) percent expansion shall be prohibited.

After reviewing the ordinances in question, we agree with the Board and the circuit court that the ordinances are capable of a reasonable reconciliation, namely, that Ordinance 26-90 was intended merely to amend subsections 500.1 and 500.2. It would appear that the ordinance's original language was restated in Ordinance 26-90 with the changes made therein simply to provide the context of the language under consideration. We find, therefore, that the circuit court was correct to hold that the amortization period continued to apply to Thee DollHouse's nonconforming use.

**AFFIRMED IN PART AND REVERSED IN PART.**

#### FOOTNOTES

1. On January 6, 1995, the circuit court granted Thee DollHouse's motion to stay enforcement until the January 12, 1995, hearing.
2. Because we reverse on this ground, we do not address the County's remaining arguments.
3. In fact, Thee DollHouse did not introduce any evidence that it would even incur a financial loss if it was

forced to clothe its dancers.

4. Section 526.2J provides as follows:Amortization. The right to maintain a legal non-conforming adult entertainment establishment shall terminate in accordance with the following schedule:

Amount of capital investment * as of	Date Before	the Effective Date	Which Use
5,000	January 1, 1991	to 8,000	January 1, 1992
8,000	January 1, 1992	to 15,000	January 1, 1993
15,000	January 1, 1994	to 22,000	January 1, 1995
22,000	January 1, 1995	or more	January 1, 1995

\* NOTE: The term "capital investment," as used above, is defined to mean the initial outlay by the owner or operator of the use to establish the business as of the date of the enactment of the ordinance, exclusive of the fair market value of the structure in which the use is located.

This ordinance is to take effect on September 30, 1989.

PER CURIAM:

HEARN, STILWELL and HOWARD, JJ., concur.

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**MANAGE YOUR CAREER**

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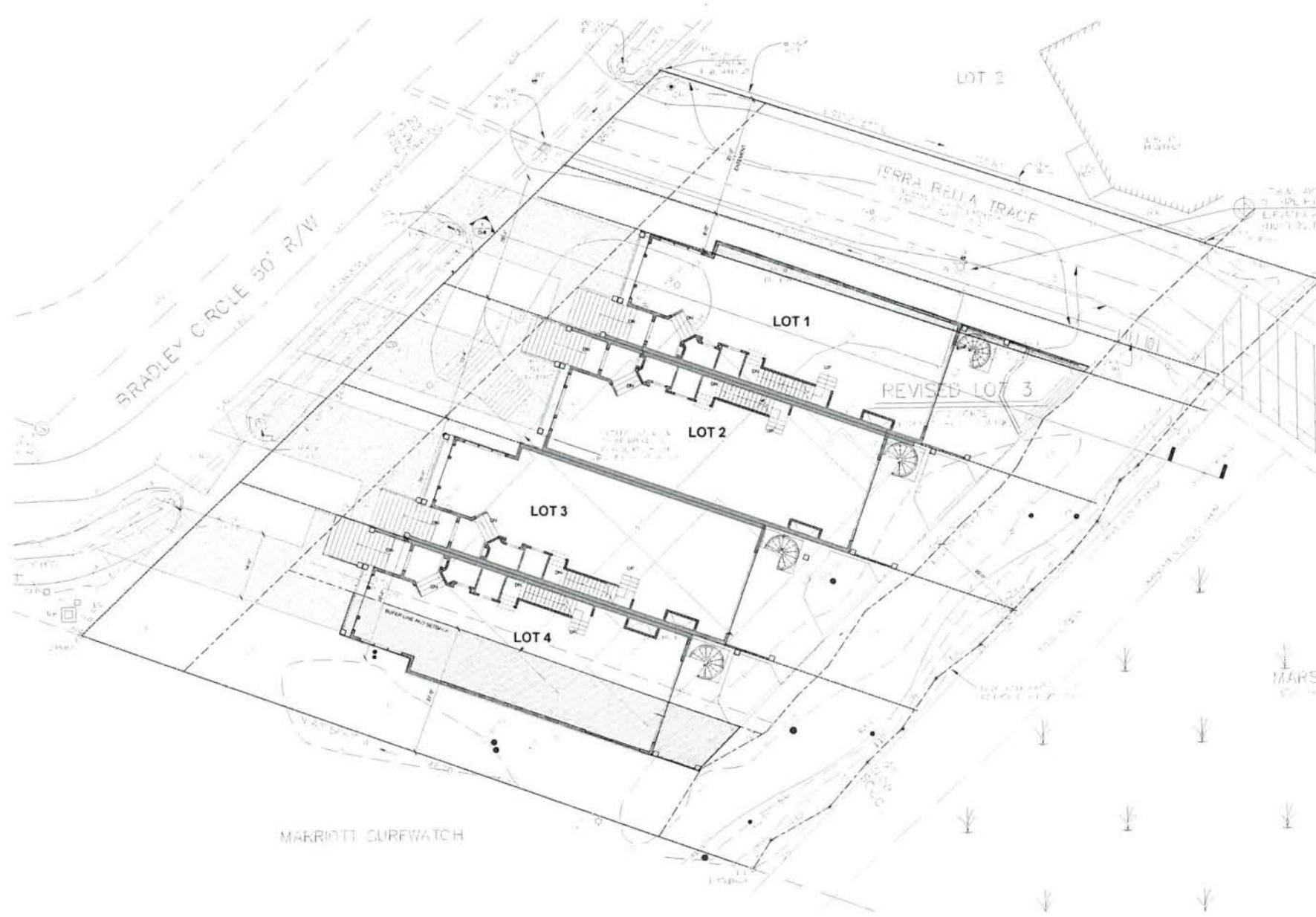
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*Side Setbacks/Buffers*

**SITE PLAN**  
SCALE: 1/8" = 1'-0"

LOT 22 BRADLEY CIRCLE, HILTON HEAD ISLAND SC  
TRANSCON IND., LLC

No.	Description	Date

Project Name: 22 B  
 Date: 07-30-15  
 Drawn by: Author  
 Checked by: Checker

**C**  
 Scale: 1/8" = 1'-0"

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 CIRCLE ARCHITECTURAL  
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**SITE PLAN**

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FRONT ELEVATION SETBACK LINE -60 DEGREE  
SCALE : 3/16" = 1'-0"

*60° Setback Angle*

LOT 22 BRADLEY CIRCLE, HILTON HEAD ISLAND SC  
TRANSCON IND. LLC

Revision Schedule	Date
Description	
Rev.	

Project Number: 22 B  
Date: 07-30-15  
Drawn By: Author  
Checked By: Checker

**D-1**  
Scale: 3/16" = 1'-0"

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ELEVATION  
SETBACK 60 DEGREE

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**BUILDING SECTION 60 DEGREE**  
 SCALE : 3/16" = 1'-0"

*60° Front Setback Angle*

LOT 22 BRADLEY CIRCLE, HILTON HEAD ISLAND SC  
 TRANSCON IND. LLC

No.	Description	Date

Project Number: 22 B  
 Date: 07-30-15  
 Drawn By: Author  
 Checked By: Checker

**D-4**  
 Scale: 3/16" = 1'-0"



**BUILDING SECTION 75 DEGREE**  
SCALE : 3/16" = 1'-0"

*75° Front Setback Angle*

LOT 22 BRADLEY CIRCLE, HILTON HEAD ISLAND SC  
TRANSCON IND. LLC

No.	Revision Schedule	Description	Date



Project Number: 22 B  
Date: 07-30-15  
Drawn By: Author  
Checked By: Checker

**D-5**  
3/16" = 1'-0"

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**BUILDING SECTION 75 DEGREE**



# TOWN OF HILTON HEAD ISLAND

## *Community Development Department*

**TO:** Board of Zoning Appeals  
**FROM:** Nicole Dixon, CFM, *Senior Planner*  
**DATE:** August 4, 2015  
**SUBJECT:** Substitutions of Nonconformities for Redevelopment

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The Board of Zoning Appeals (BZA) requested that staff keep them informed of substitutions of nonconformities for redevelopment that are granted by staff. A memo is distributed every month at the regular BZA meetings and is discussed under staff reports on the agenda. Even if there have been no waivers for the month, a memo will be included in the packet to inform the BZA members.

The following language is contained in Section 16-7-101.F, Substitutions of Nonconformities for Redevelopment, which gives the Administrator the power to grant such substitutions for existing nonconforming structures and site features.

LMO Section 16-7-101.F:

“To provide flexibility and encourage redevelopment of sites with nonconforming features or structures, the Official is authorized to approve a Development Plan for such sites if the proposed development:

1. Will not include any new development that increases the amount of encroachment into any required buffer or setback;
2. Will not increase the impervious cover on the site over the maximum allowed for the district or the existing impervious cover, whichever is greater;
3. Will not result in a density in excess of what is allowed under this Ordinance, or the existing density, whichever is greater;
4. Will lessen the extent of existing nonconforming site features to the greatest extent possible;
5. Will not have an adverse impact on the public health, safety or welfare; and
6. Will lessen the extent of nonconformities related to any existing nonconforming structure on the site to the greatest extent possible.”

There have not been any Substitutions of Nonconformities for Redevelopment granted by staff since the July 2015 Board of Zoning Appeals meeting.