

**VARIANCE REQUEST
ZONING BOARD OF ADJUSTMENT
September 24, 2019**

CASE: ZBA-942

PETITIONER: Mihaly Land Design, PLLC, applicant, on behalf of Chase & Dylan Mihaly, LLC, property owner.

REQUEST: Variances from the side yard setback requirements per Section 60.3 and the buffer strip width requirements per Section 62.1-4(2) of the New Hanover County Zoning Ordinance.

LOCATION: 7031 Market Street
PID: R04400-002-015-000

ZONING: R-15, Residential District

ACREAGE: 0.32 Acres

PETITIONER’S REQUEST:

Mihaly Land Design, PLLC, applicant, on behalf of Chase & Dylan Mihaly, LLC, property owner, is requesting two variances related to setback and buffer width requirements in order to construct an office building on the site, contingent upon the successful rezoning of the property to a Conditional B-2, Highway Business District. Currently, the property is zoned R-15, Residential District. The applicant intends to file a rezoning application in conjunction with this request in order to rezone the property in a conditional B-2 Highway Business, which would allow the office building to be permitted. The applicant is proposing variances from two separate sections of the Zoning Ordinance which would apply to the site should it be zoned (CZD) B-2:

- (A) A 14.59’ variance from the 63.25’ minimum side yard setback required on the northeastern property boundary per Section 60.3 of the ordinance.
- (B) A 18.43’ variance from the 31.60’ minimum required landscape buffer per Section 62.1-4(2) of the ordinance to allow parking and drive areas within the buffer. At the narrowest point, the applicant is proposing a 13.17’ wide buffer consisting of 2 rows of wax myrtles in addition to a 6’ artificial fence to provide a buffer to the adjacent property, with 6 parking spaces and a portion of the driveway encroaching into the required buffer.

The applicant contends that the variance is necessary due to several factors, including: limited buildable area to develop the site with a commercial use, the intent to preserve several mature live oak trees on site, and the presence of a utility easement which traverses the southwestern portion of the parcel.

BACKGROUND AND ORDINANCE CONSIDERATIONS:

The subject property consists of 0.32 acres located on the western side of Market Street and is currently zoned R-15 Residential District. The applicant intends to apply for a rezoning of the property to a conditional B-2, Highway Business District, which would allow development of an office building on-site. The applicant is proposing a 2,000 square foot, 2-story office building on the site, which is currently undeveloped.

Should the property be rezoned and developed as a commercial site, the required setbacks for commercial uses which abut residential uses or districts are addressed in Section 60.3 of the Zoning Ordinance:

Section 60.3: Setbacks

For the purposes of this Ordinance, setbacks shall not be required for nonresidential structures located within Commercial, Office and Institutional and Industrial Districts that abut nonresidential uses in Commercial, Office and Institutional and Industrial Districts. (12/17/2012)

Setbacks shall be measured from the structure. If a roof overhang extends more than two (2') feet from the structure, the setback shall be measured from the drip line of the roof. (12/17/2012)

The required minimum setbacks for structures located within Commercial, Office and Institutional and Industrial Districts abutting residential uses and/or platted lots on residentially zoned property shall be calculated from Table 60.3 utilizing the following formulas. Where the adjacent residential district is occupied by non-residential uses, the minimum setback shall be twenty (20) feet. (5/4/98)

- (1) Side yard Required setback
- (2) $(\text{Building Height}) \times (\text{Factor from Column B, Table 60.3})$
- (3) Rear yard Required setback
- (4) $(\text{Building Height}) \times (\text{Factor from Column D, Table 60.3})$
- (5) Reductions in setbacks
- (6) *The required setbacks may be reduced as specified in Section 62. In no case, however, shall any side or rear yard setback be less than specified in Table 60.3 (3/9/88)*

DISTRICT	SIDE YARD SETBACK FACTOR	MINIMUM SIDE YARD SETBACK, IN ALL CASES	REAR YARD SETBACK FACTOR	MINIMUM REAR YARD SETBACK, IN ALL CASES
B-1	2.75	25'	3.73	30'
B-2	2.75	30'	3.73	35'
O&I	2.75	25'	3.73	30'
I-1	3.08	35'	4.33	40'
I-2	3.49	40'	5.14	45'
A-1	3.08	35'	4.33	40'

With a rezoning of the property to (CZD) B-2, setbacks would be required on the northeast and northwest boundaries of the property, adjacent to residential districts or uses. Using the proposed building height of 23' and the applicable setback factor of 2.75 in the B-2 district, the required side yard setback from the northeastern property line would be 63.25'. The applicant has proposed a site plan that locates the proposed building 48.66' from this property line, but it cannot be moved any further due to the acreage of the lot and the presence of a Duke Energy easement on the southwestern portion of the site. Thus, the applicant is requesting a variance of 14.59' feet from the required side yard setback on the northwest side.

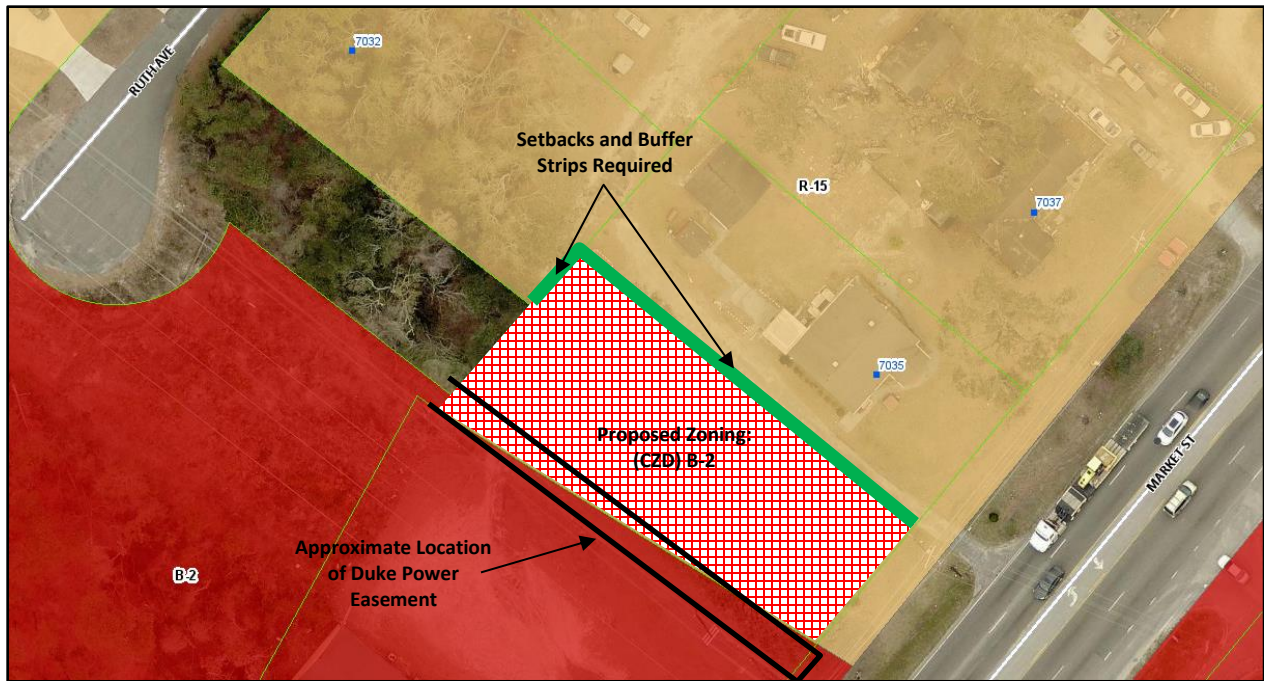


Figure 1: With a proposed (CZD) B-2 district on the subject site, setbacks and buffers are required on boundaries adjacent to residential districts or uses.

Additionally, applicable language from Section 62.1(4)(2) of the Zoning Ordinance requires that a buffer strip of 50% of the setback be provided:

62.1-4: Additional Requirements for Berms and for Yards in which Buffers are Required

Buffer strips are designed to protect adjoining land uses, particularly residential, from the noise, heat, dust, lights, threats to privacy, and aesthetic impacts from more intense land-uses. Buffer strips shall be required along all property lines adjacent to a residential use or district, except where a reduced building setback precludes placement of a buffer strip in situations where the adjoining property contains a nonresidential use on residentially zoned property, such as a church or school. The more intense land use shall be required to provide the buffer as part of its yard requirements. The following requirements shall be met for buffer strips and the yards in which buffers are required:

- (1) Location of buffer strips - Buffer strips shall be required to screen any non-residential use from any residential use or district. Buffers strips shall also be required to screen the below developments from the adjacent land uses, however, no buffer will be required for high density detached lots provided lots equal or exceed 5000 square feet (10/7/91). Buffer strips shall be required only along the perimeter boundary of an EDZD (3/1/10).

New Development of Subject Site	Must Provide Buffer Strips From:
<ul style="list-style-type: none"> • Attached residential developments; • Mobile home parks; • High density developments; or • Planned developments. 	<ul style="list-style-type: none"> • Detached or duplex residential structure; • Undeveloped residentially zoned land within the General Residential or Rural Residential place types; • Platted residential lots; or • Proposed residential lots included within an approved and valid preliminary plat for a major subdivision.

- (2) Width of buffer strips - The buffers shall have a base width equal to at least 50% of the required setback. In all cases the base of the buffer shall be equal to or greater than 20 feet. Where a utility easement occupies a portion of the buffer, sufficient buffer must be provided outside the utility easement to meet the required opacity standards.

When applying the ordinance language from this section, the minimum buffer width on the northeastern boundary would 31.63'. The proposed site plan shows this area largely reserved from development with the exception of 6 parking spaces and a portion of the entry drive which encroach into the buffer. The applicant is providing 2 rows of wax myrtles in addition to a 6' artificial fence to meet the intent of the buffer requirements.

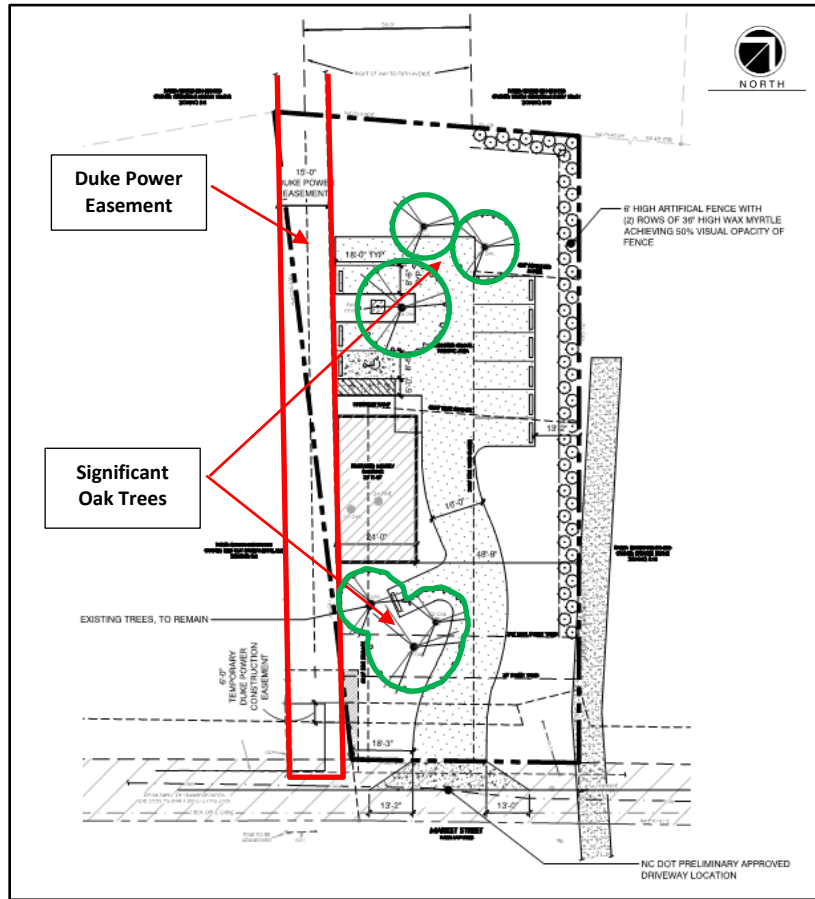


Figure 2: Proposed site plan.

If rezoned to a (CZD) B-2 district, the applicant contends that difficulties arise in designing a commercial development on the site due to the setbacks required from residential uses or districts, and that the current zoning of this lot is no longer the most appropriate district at this location. The required setback and buffer width on the northeast side of the property results in a limited buildable envelope, which is exacerbated by the presence of the Duke Energy easement on the southwestern side. The applicant also contends that the variances are necessary to incorporate the existing 24", 30", and 34" oak trees on the northern side of the property as well as the two 32" and 38" oak trees on the southern corner of the property into the site design.

In summary, the applicant is requesting variances from the parking lot perimeter planting requirements detailed in Section 62.5-(2)(A) of the Zoning Ordinance. In addition, the petitioner is also requesting a variance from the street yard planting requirements in order to plant half of the required understory trees and shrubs as required in Section 62.1-10(2)(A).

BOARD OF ADJUSTMENT POWER AND DUTY:

The Board of Adjustment has the authority to authorize variances from the terms of the Zoning Ordinance where, due to special conditions, a literal enforcement of the regulations would result in unnecessary hardship. In granting any variance, the Board may prescribe appropriate conditions and safeguards in conformity with the Zoning Ordinance. A concurring vote of four-fifths (4/5) of the voting members of the Board shall be necessary to grant a variance. A variance shall not be granted by the Board unless and until the following findings are made:

1. Unnecessary hardship would result from the strict application of the ordinance. It shall not be necessary to demonstrate that, in the absence of the variance, no reasonable use can be made of the property.
2. The hardship results from conditions that are peculiar to the property, such as location, size, or topography. Hardships resulting from personal circumstances, as well as hardships resulting from conditions that are common to the neighborhood or the general public, may not be the basis for granting a variance.
3. The hardship did not result from actions taken by the applicant or the property owner. The act of purchasing property with knowledge that circumstances exist that may justify the granting of a variance shall not be regarded as a self-created hardship.
4. The requested variance is consistent with the spirit, purpose, and intent of the ordinance, such that public safety is secured, and substantial justice is achieved.

ACTION NEEDED (Choose one):

1. **Motion to approve the variance request based on the findings of fact (with or without conditions)**
2. **Motion to table the item in order to receive additional information or documentation (Specify).**
3. **Motion to deny the variance request based on specific negative findings in any of the 4 categories above.**