



## CITY OF HENDERSONVILLE BOARD OF ADJUSTMENT

Operations Center - Assembly Room | 305 Williams St. | Hendersonville NC 28792  
Tuesday, October 11, 2022 – 1:30 PM

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### AGENDA

1. **CALL TO ORDER**

2. **APPROVAL OF AGENDA**

3. **APPROVAL OF MINUTES**

A. Minutes of September 13, 2022

4. **OLD BUSINESS**

5. **NEW BUSINESS**

A. Variance Application: Rick Moore - 153 Queen St.(B22-093-VAR) - *Alexandra Hunt, Planner I*

B. Variance Application - Maria Lawing - 1523 Dawnview Dr. (B22-093-VAR) -*Alexandra Hunt, Planner I*

6. **OTHER BUSINESS**

7. **ADJOURNMENT**

*The City of Hendersonville is committed to providing accessible facilities, programs and services for all people in compliance with the Americans with Disabilities Act (ADA). Should you need assistance or an accommodation for this meeting please contact the City Clerk no later than 24 hours prior to the meeting at 697-3005.*



## MINUTES OF THE HENDERSONVILLE BOARD OF ADJUSTMENT

Tuesday, September 13, 2022  
1:30 p.m. in the City Operations Center

The Hendersonville Board of Adjustment held its regular monthly meeting on August 9, 2022, at 1:30 p.m. in the Assembly Room in City Operations Center, 305 Williams Street, Hendersonville, North Carolina. Those present were: Melinda Lowrance, Chair, Ernest Mowell, Vice-Chair, Laura Flores, Charles Webb, Kathy Watkins, Stefan Grunwald, Peter Hanley, Fred Nace, Libby Collina, Sharon Alexander, Attorney to the Board, Lew Holloway, Community Development Director, Matthew Manley, Planning Manager, Alexandra Hunt, Planner I, Daniel Heyman, Staff Attorney, Tyler Morrow, Planner II and Angela Beeker, City Attorney.

Absent: Michael Edney

Chair called the meeting to order at 1:30 p.m.

Approval of the Agenda: A motion was made by Mr. Mowell to approve the agenda. The motion was seconded by Ms. Watkins and passed unanimously.

Approval of the Minutes of the August 9, 2022 meeting. A motion was made by Mr. Mowell and seconded by Ms. Collina to approve the minutes as written. The motion passed unanimously.

Approval of the Decision: **B22-070-VAR** – James Walgenbach, Variance. A motion was made by Mr. Mowell to approve the decision as written. Ms. Collina seconded the motion which passed unanimously.

### **Administrative Appeal – OP Management, LLC – Oak Preserve (B22-051-ADMIN).**

Chair stated today we have one Administrative Appeal to hear from OP Management, LLC. Any persons desiring to testify in these hearings must first be sworn in. Since this is a quasi-judicial hearing, it is very important that we have an accurate record of what goes on here. Therefore, we must ask that you refrain from speaking until recognized by the Chair and, when recognized, that you come forward to the podium and begin by stating your name and address. Anyone present who has knowledge of anything of value that has been given or promised in exchange for a position to be taken on this application should disclose it now.

Angela Beeker, City Attorney stated for the record that she would not be a witness but was here in her capacity as the City Attorney.

Chair swore in all persons to give testimony. Those sworn in were Alexandra Hunt, Matt Manley, Lew Holloway, Travis Penland, Tyler Morrow, Chris Conard, Ben Allamong, David Lee and Troy Lee.

Chair opened the public hearing.

Angela Beeker, City Attorney for the City of Hendersonville stated she would be appearing here to represent the City of Hendersonville in this appeal. This is an appeal of a Notice of Violation that was



issued by the city to OP Management, LLC. There are a couple of preliminary matters that need to be addressed before they start the hearing. The first being the city has retained Sharon Alexander to be the Board's legal counsel. That means that Ms. Beeker is here advocating for the city and while she will make legal arguments and give legal opinions, they are in the representation of the city. The Board will need to look to Sharon Alexander if they have legal questions and they need an opinion. That is why she is here, to provide representation to the Board today. Ms. Beeker stated the second thing is they do have a quorum and just for the record it is staff's position that this is not a variance but an appeal that a majority is all that is required to make this decision. Ms. Beeker stated this is the first appeal since she became City Attorney, and it is quasi-judicial hearing, and their position is that the very first order of business would need to be identification of the parties. Parties and witnesses are different under quasi-judicial procedures. Ms. Beeker asked if Ms. Alexander would like to explain this. Ms. Alexander stated she was fine with Ms. Beeker's explaining. Parties are afforded full procedural due process rights. That means they can ask questions, they can do cross examination, they can make arguments as long as they are representing themselves, they can represent themselves. A witness can just get up and give testimony, so the people who are entitled to full due process rights need to first be identified. For the record she would submit that she knows that the City of Hendersonville is a party and the property owner OP Management, LLC is a party. She did not know if there were any other parties. Parties who can establish standing to participate fully as a party and not just a witness. She would ask that those be identified.

Sharon Alexander, Attorney to the Board stated to the Chair that she understands that Ms. Beeker is advocating on behalf of her client telling what her opinion is and her understanding of the law and she agrees with what she said, and she cannot answer any questions that the Board has but Ms. Alexander would be happy to answer any questions the Board may have about that. Ms. Alexander stated she agreed with Ms. Beeker that before the Board gets into the substance of this, they do need to identify those persons with standing that would be considered a party. Chair asked if she needs to have each one state their name and address individually. Ms. Alexander stated yes and tell them the basis for their position that they are a party to this action.

Chair stated those individuals that were sworn in, if you are a party would you please come forward and state your name and your reason.

Troy Lee stated his name and that he was the managing member and majority shareholder of OP Management and as such he has adequate standing to represent his company.

David Lee stated his name and that he is there as a witness and to show support because Troy is his brother. He lives here in the county and has been here over 20 years. He works and plays here, and he loves this city. He appreciates they have an opportunity to discuss this with the Board today. He may or may not have a comment, but he just wanted the Board to know who he was. He lives at 2207 Kanuga Road.

Ms. Beeker stated for the record that they object to Mr. Lee appearing in a representing capacity on behalf of OP Management, LLC. She thinks he can testify as a witness, and she understands he has law degree but he is not licensed in the State of North Carolina and she has the statute on the unauthorized practice of law and an advisory opinion issued by the North Carolina State Bar who enforces the unauthorized practice of law which basically says that to appear in a representational capacity in a quasi-judicial matter like this you must be an attorney licensed at law. And unless he can establish



standing for himself individually, we would object to him appearing in a representational capacity on behalf of OP Management, LLC.

Mr. Grunwald asked if the objection was to Mr. Troy Lee or Mr. David Lee. Ms. Beeker stated actually she didn't get to Mr. David Lee. She doesn't believe he has put forth adequate information or adequate evidence to support his being named a party either. So yes, they would object to him being a party. He could testify in their opinion, but their position would be he could not testify as a party. Ms. Alexander stated she was looking at the property address and it does not look like he is an adjacent property owner so he would not have standing to appear as a party. And if the Board has any questions on how to draw the distinctions between Mr. Troy Lee testifying and representing the company, she will be glad to address those. It is a difficult issue to dice. Ms. Watkins found it difficult to understand why he couldn't represent himself. Ms. Alexander stated the party is the company and there are lots of court cases as well as this opinion and others that say that is a separate entity from Mr. Lee and so for someone to represent that independent entity, because he has probably worked pretty hard to maintain the integrity of that as a separate entity, so it is not one and the same. Chair stated so he can't represent them legally. Ms Alexander stated he can't represent them at all. Chair stated so they cannot hear this.

Mr. Lee asked if he could say something. Ms. Beeker stated their position is he can testify and anyone else that is with him can testify. He just can't cross examine witnesses and make legal arguments and those kind of things. Absolutely he can testify. He just cannot practice law.

Mr. Lee stated he understands the argument that counsel is making, however if you look at the deed and all the paperwork, it is his signature that is on there. He also filed the notice of appeal in his name, and he was granted the appeal. If you look at the notice of appeal it says "I, Troy Lee", and as such he was given this hearing based on that particular document. As such, he feels it would be an incredible disservice to not only himself but to other people that a property owner cannot come before a Board and discuss a notice of violation that he would have to pay. As far as being able to point to statutory language to the Board and discuss the legislative intent as it is written in the code books, he is just reading and pointing to it, he is not interpreting it and he should be able to discuss that with the Board. It is public knowledge.

Ms. Alexander stated he is right it is public knowledge, but he would be stepping over his line from testifying as to the facts within his knowledge. What a lay witness can testify about is facts of which they have firsthand knowledge. He does not have firsthand knowledge of the facts about, for example the statutory history of the ordinance, really, he is not a competent witness as to prove the ordinance. The problem is, it is a problem for him because he would be committing a crime and you all would be involved with assisting him in doing that if you allow him to act in any way as an attorney. It would put Ms. Beeker and herself in a spot because they are required by the state bar to report to the bar anybody practicing law without a law license. It seems like a silly fine line to draw but it is an important line. In this case he is certainly free to testify to the facts. As to the notice of appeal he filed, she thinks the Board can take that in one or two ways in that it certainly is in your discretion to interpret this. You can take it that it is invalid because it was not signed on behalf of the applicant, which is required by the ordinance. Or you can take that he signed it in his capacity as a manager of the LLC. But you cannot take it that he, it's not valid if you take his position that it was signed by himself individually. Then it is not a valid notice of appeal.



Ms. Watkins asked if they could take it as him filing it as the member manager. Ms. Alexander stated absolutely and that is the way she read it because that is the party that had the right to appeal.

Mr. Mowell asked the Board members if they were accepting this as a valid notice of appeal and now, they are strictly talking about Mr. Lee's capacity at the hearing. Ms Alexander stated if you determine to read his signature on that appeal as being shorthand and he just left off the part that he was signing it on behalf of the LLC, that's the party that had the ability to, that is the aggrieved party that could appeal from the administrative decision. Ms. Collina stated technically it should have said LLC, member manager by, then it should have said I, Troy Lee. Ms. Alexander stated that is correct.

Ms. Beeker asked if she could be heard on this issue since this is a new issue unrelated to his ability to participate fully in this hearing. His testimony was that he filed it individually, he, himself. He filled it out and he signed it individually, he himself. He under oath testified that he did it individually so on that basis they would move that his appeal be dismissed.

Ms. Alexander stated that is an issue upon which the Board can rule at this point. Chair asked if they should go into closed session for this for discussion. Ms Alexander stated she can certainly talk abstractly with the Board about the law about signatures on documents and give you legal advice under closed session. They cannot talk about these facts in a closed session. Ms. Alexander asked if any of the parties had an objection to that. Chair stated they wanted to go into closed session so that Ms. Alexander can explain the legal aspects but not pertaining to this case, just the signatures. Chair asked if anyone had an objection to that. No one had any objection.

Mr. Lee stated he can still testify as a witness. He was the person that did the physical acts themselves. He was the person that was onsite, and he has firsthand knowledge. So, although the company may be unrepresented, he should be able to give the Board the necessary facts to be able to determine whether or not this notice of violation is indeed valid. Ms. Alexander stated she does not think they are there yet. She thinks the city has made a motion to dismiss because the notice of appeal is invalid, and the Board needs to rule on that. If you want to go into closed session to get legal advice as to the law abstractly on that issue, then she thinks that is the next step.

*Ms. Watkins made a motion that the Board go into closed session for the purpose of getting legal advice from their attorney. Mr. Hanley seconded the motion which passed unanimously.*

The Board went into closed session at 1:49 pm.

*Mr. Mowell made a motion that the Board come out of closed session. Mr. Hanley seconded the motion which passed unanimously.*

The Board returned from closed session at 2:07 pm.

Chair stated the Board members have heard Ms. Beeker and the city's position on this. They are now open for discussion. Mr. Mowell stated it seems to him at least procedurally the question is, is it a valid appeal and if he is understanding correctly that is what they have to decide before they can do anything else. Chair stated yes.



Mr. Mowell asked if they were allowed to ask the City Attorney a question. Ms. Alexander stated she certainly is an advocate for her client and so they can ask her questions in that capacity. You cannot ask her to give you advice, but you can certainly ask her position and her understanding of the law.

Mr. Mowell stated his question is more of a clarification. He is asking the City Attorney is the argument that this is not a proper appeal based on how Mr. Lee is represented in the signature block? Ms. Beeker stated yes sir, and she is going to explain standing and give their position, she is not giving them legal advice. She stated in a court of law and in a quasi-judicial proceeding like this there is something called standing that you have to be able to have to move forward. It goes all the way back to the filing of the appeal. You have to have standing to even file the appeal. And Mr. Lee testified that he filed that appeal individually. That individually he wrote it, individually he saw it because he was trying to establish his individual standing, he said that and so as an individual he has no standing to file an appeal on behalf of the corporation and so therefore, we are moving that it be dismissed because he had no standing to file the appeal and because he testified that he did it individually.

Chair asked for a motion. Ms. Alexander stated there is a motion by the city and their motion should address whether to grant or deny the city's motion.

*Mr. Nace moved the Board grant the City's motion to dismiss this appeal on the grounds that the notice of violation was provided to OP Management, LLC and OP Management LLC did not appeal that decision. Ms. Watkins seconded the motion.*

Chair called for the vote. The following vote was taken by a show of hands.

Mr. Hanley	Yes
Mr. Mowell	Yes
Mr. Webb	Yes
Ms. Lowrance	Yes
Mr. Grunwald	Yes
Ms. Flores	Yes
Ms. Watkins	Yes
Mr. Nace	Yes
Ms. Collina	Yes

The vote was unanimous. Motion approved.

Ms. Beeker stated for the Board's knowledge and consideration, the notice of violation that was issued offered Mr. Lee two options. To either do a planting or pay a fine, he has agreed to do the planting, which was what the city was really going after anyway. They will have to work out the logistics of the procedure on that. This is so the Board has knowledge that the violation is going to be abated with the planting.

Ms. Beeker asked Chair who she wanted to prepare the order. Ms. Alexander stated she would prepare the order.



Mr. Hanley made a motion to close the public hearing. Ms. Watkins seconded the motion which passed unanimously.

Meeting adjourned at 2:25 p.m.

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Melinda Lowrance, Chair

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Terri Swann, Secretary

DRAFT



## MEMORANDUM

**TO:** Board of Adjustment Members

**FROM:** Community Development Department

**DATE:** October 11, 2022

**RE:** Variance Application –153 Queen St.

**SUMMARY:** The Community Development Department has received an application from Rick Moore for a variance from Section 5-14-6.2 Dimensional Requirements. The subject property is currently zoned R-20, Low-Density Residential. The specific variance requested is for the following:

**VARIANCE REQUEST:** The variance requested is to reduce the setback requirements of Section 5-14-6.2 of the Hendersonville Zoning Ordinance from 35' from the centerline to 27' from the centerline for only townhomes numbered 1-10 as shown on the submitted preliminary site plan in Exhibit C (attached) for the purpose of limiting the amount of required fill within the 100-year Flood Zone.

### PROPOSED FINDINGS OF FACT:

- The subject property located at 153 Queen St. and possesses a PIN of 9569-75-0342.
- The subject property is zoned R-20 Low Density Residential and is located in the City's Extraterritorial Jurisdiction (ETJ).
- Based on Henderson County records, the lot size is approximately 13.26 acres or 577,605.6 square feet.
- Based on Henderson County records a North Carolina General Warranty Deed between the Estate of Martha Kate Maxwell Lancaster and Stanley Freno Lancaster and Elain Lancaster (Grantor) and Rick Moore and Mitch Gaither (Grantee) was recorded on April 22, 2022. (*Exhibit B*)
- Section 5-14-6.2 of the City of Hendersonville Zoning Ordinance requires all dwellings and accessory structures abutting a street intended to serve more than 32 dwelling units or intended to be dedicated as a public street must be set back a minimum of 35 feet from the center line of such street.
- Based on the Variance Application (*Exhibit A*), the Applicant is requesting to reduce the setback requirement in Section 5-14-6.2 from 35 ft to 27 ft for townhomes numbered 1-10 as shown on the submitted preliminary site plan (*Exhibit C*).
- Based on Henderson County GIS Mapping a portion of the subject property is in the 100-year Flood Plain (*Exhibit D*).
- Section 17-2-4(d) of the City of Hendersonville Zoning Ordinance allows a property owner or developer to fill and/or use for development more than 10% of the special



flood hazard area when such would be necessary so that the property to be developed, including both the special flood hazard area and land adjacent thereto, equals one-half acre.

- Section 12-2 of the City of Hendersonville Zoning Ordinance defines special flood hazard area as the land in the floodplain subject to a one percent (1%) or greater chance of being flooded in any given year.

## **CODE REFERENCES.**

**5-14-6.2 Setbacks.** All dwellings and their accessory structures shall be set back not less than 40 feet from the nearest right-of-way line for any street or railroad adjoining the site; provided, however, such setback may be reduced to ten feet when parking is situated to the side or rear of the lot and screened from view from public rights-of-way.

Furthermore, such buildings and structures shall be set back not less than 30 feet from any exterior property line which is not a right-of-way.

The Planning Board or City Council, as the case may be, shall require reservations of rights-of-way, as well as increased setbacks, for roads identified in the Comprehensive Transportation Plan, including existing roads to be widened as well as corridors of new roads.

All dwellings and their accessory structures shall be located at least ten feet from the edge of the paving for any street or drive and at least five feet from the edge of the paving for any area devoted principally to parking. Carports shall be situated at least ten feet from the edge of the paving for any street or drive and may be physically connected to the principal structure which they serve. In addition, dwellings and accessory structures abutting a street intended to serve more than 32 dwelling units or intended to be dedicated as a public street must be set back a minimum of 35 feet from the center line of such street. The approved setback lines shall be shown on the plan of development and on any recorded subdivision plat.

In addition to the foregoing setback requirements, minimum spacing between buildings shall be provided as per the NC State Building Code Volume V-Fire Prevention.

**5-14-7 Minor Planned Residential Developments.** An applicant may elect to have a development processed as a minor planned residential development so long as the proposed development, including all phases, does not exceed 50 dwelling units and so long as no accessory commercial development is requested for the project. A minor planned residential development may be located in one or more of the following zoning district classifications: R-40, R-20, R-15, R-10, R-6, MIC, RCT, C-2, C-3, I-1.

## **17-2-2 Development Allowed in the Floodway and Special Flood Hazard Area.**



- a) Land in the floodway and special flood hazard area may be used for the following purposes, provided that such uses are designed and constructed to minimize clearing, grading, erosion and water quality degradation:
  - 1) Crossings by streets, driveways, culverts and railroads;
  - 2) Active and passive recreational activities authorized in the zoning district in which the property is situated;
  - 3) Intakes, docks, utilities (including water and wastewater treatment, stormwater control and sedimentation and erosion control facilities), bridges, other public facilities and water-dependent structures;
  - 4) Wetlands constructed or restored for mitigation purposes;
  - 5) Redevelopment pursuant to Section 17-2-4, below; and
  - 6) Land within the floodway and special flood hazard area can serve to meet minimum lot size requirements if there is sufficient buildable area remaining on the tract.
- b) Land in the special flood hazard area may be used for up to 25% of the parking required for the development on the tract; provided, there is no increase in the elevation of the land resulting in a loss of flood storage. Furthermore, no more than one-third of the special flood hazard area on any development tract shall be used for parking. Parking in the special flood hazard area shall undergo development review in accordance with Article VII, above. In considering the application for development approval, the City shall consider whether the proposed parking on the site is designed and arranged to minimize adverse environmental impact from placement of parking in the special flood hazard area and whether the proposed development would result in significant degradation of water quality, loss of significant wetlands, increase in sedimentation and erosion, increase in stormwater runoff, loss of significant plant and wildlife habitat or would otherwise constitute a threat to public safety. Where feasible, the proposed parking shall be designed making maximum use of pervious materials.
- c) Streets and driveways may run generally within special flood hazard area and parallel to the stream only where no other access to the property is feasible. Such streets and driveways shall be designed to minimize loss of flood storage.
- d) In order to allow design flexibility to achieve high quality site design and better utilization of land adjacent to the special flood hazard area, a property owner or developer may fill and/or use for development up to 10% of the special flood hazard area contained within the boundaries of any development site upon satisfactorily demonstrating the following:



- 1) The proposed fill and/or development provides for a higher quality site design and better utilization of land adjacent to the special flood hazard area than would be possible without the intrusion necessary to achieve the high quality design; and
- 2) The proposed fill and/or development represents the minimum amount of special flood hazard area intrusion necessary to achieve the high quality design.

Public and private roads and sidewalks shall not count toward the allowable 10% of the special flood hazard area on a tract that can be filled and/or used for development in accordance with Section 17-2-2(d).

A property owner or developer may fill and/or use for development more than 10% of the special flood hazard area when such would be necessary so that the property to be developed, including both the special flood hazard area and land adjacent thereto, equals one-half acre.

- e) Notwithstanding the foregoing, for parcels existing prior to the effective date of this ordinance situated entirely within the 100-year flood plain as depicted on the most recent Flood Insurance Rate Map, a property owner or developer may fill and/or use for development up to one-half acre or 10% of such property, whichever is greater. Provided, however, in order to develop such lands, the property owner or developer must comply with all applicable regulations of the Federal Emergency Management Administration including obtaining a “no-rise” certificate, if necessary. Furthermore, in order to qualify for the exception contained in this paragraph, proposed development shall be situated and designed in such a way as to be consistent with the purposes of this article as set forth in Section 17-1, above.
- f) It is intended that this ordinance be congruous with the City of Hendersonville Flood Damage Prevention Ordinance. Therefore, any uses, development or land disturbing activity allowed by Section 17-2 shall be conducted in accordance with the requirements of the Flood Damage Prevention Ordinance, including, without limitation, the requirement to obtain a “no-rise” certificate for activities within the floodway.

#### **Section 12-2 Definition of Commonly Used Terms and Words:**

**Special Flood Hazard Area:** The land in the floodplain subject to a one percent (1%) or greater chance of being flooded in any given year.



### **Section 10-9 Variance.**

A Variance is a means whereby the City may grant relief from the effect of the Zoning Ordinance in cases of hardship. A Variance constitutes permission to depart from the literal requirements of the ordinance. When unnecessary hardships would result from carrying out the strict letter of a zoning ordinance, the Board of Adjustment shall vary any of the provisions of the ordinance upon a showing of the following:

- 1) Unnecessary hardship would result from the strict application of the ordinance. It is not 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. A Variance may be granted when necessary and appropriate to make a reasonable accommodation under the Federal Fair Housing Act for a person with a disability.
- 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 is not a self-created hardship.
- 4) The requested Variance is consistent with the spirit, purpose, and intent of the regulation, such that public safety is secured and substantial justice is achieved.

The Board of Adjustment shall not have authority to grant a Variance when to do so would:

- 1) result in the extension of a nonconformity regulated pursuant to Section 6-2, above, or
- 2) permit a use of land, building or structure which is not permitted within the applicable zoning district classification. Per NCGS 160D-705 (d), appropriate conditions may be imposed on any Variance, provided that the conditions are reasonably related to the Variance.



**MOTION:**

*With regard to the request by Rick Moore for a variance from Section 5-14-6.2: Setback Requirements to:*

- 1) Reduce the setback requirement from 35' to 27' for townhomes numbered 1-10 on the submitted preliminary site plan attached and labeled as Exhibit C.

*I move the Board to find that (a) strict enforcement of the regulations would result in practical difficulties or unnecessary hardship to the applicant, (b) the variance is in harmony with the general purpose and intent of the ordinance and preserves its spirit, and (c) in the granting of the variance the public safety and welfare have been secured and substantial justice has been done.*

**(After the motion has been seconded, the movant should state the factual basis and reasoning for the motion. In doing so, bear in mind the considerations set out in Section 10-9 of the zoning ordinance.)**

Remember: Staff suggest the motion be made in the affirmative regardless of whether it is your intention to support or oppose the issuance of a variance. This does not mean that staff is recommending approval of the application. RATHER, we believe it is better procedurally to approach it this way. Once you have made the motion, you should state your position as to the required findings. For variance applications, it takes seven affirmative votes to approve this application, if others are voicing support of the application, you should make it a point to state your position vis-à-vis the required findings since your vote, even standing by itself may represent the position of the Board.



## **EXHIBITS**

- Exhibit A – Application and Site Plan**
- Exhibit B – Warranty Deed**
- Exhibit C – Preliminary Site Plan**
- Exhibit D – Henderson County GIS Map**
- Exhibit E – Site Photos**



Read ▾

Status: Su

Item A.

Entry #: 22

○ Unread

Date Submitted: 9/2/2022 9:08 AM

## Items to Accompany Application:

Completed application form

Site plan of property showing existing structures, natural features (i.e. streams, ponds, etc.) proposed building or addition and indicating distance from such to the ceterline of street and to the side and rear lot lines, as applicable. Show placement of septic systems and drain field if applicable and distances from structures.

Copy of septic permit, if applicable

Other documents supporting application, if applicable.

Photographs (optional)

Application fee of \$75.00

Shortly after application for a variance is accepted, staff will take photographs of the site. Please have the corners of the proposed structure and septic system staked so that they may be seen in such photos.

For more information call (828) 697-3010

**Date:**

9/1/2022

**Applicant Name:**

Rick Moore

**Address**

103 McDowell Road, Mills River, North Carolina 28759

**Phone****Email**

brian@mooreandson.net

**Property Owner's Name (if different from above)****Property Owner's Address (if different from above)****Parcel ID #**

9569750342

**Zoning District:**

R-20

**Directions to property from Hendersonville:**

Intersection of Main Street and Queen St.

**Attach site plan and any supporting documents/pictures**[21074 Preliminary Site Plan 2022-09-01.pdf](#)  
1 MB



## To the Board of Adjustment:

### Name

Rick Moore

(owner/agent), hereby petition the Zoning Board of Adjustment for a VARIANCE from the literal provisions of the Zoning Ordinance of the City of Hendersonville because I am prohibited from using the parcel of land described in the form "Zoning Permit Application" in a manner shown by the site plan.

### I request a variance from the following provisions of the ordinance (cite section numbers):

Zoning Ordinance 21-34 Section 5-14-6.2: 35' setback of structures from centerline of new public streets

## Factors Relevant to the Issuance of a Variance

The Zoning Board of Adjustment does not have unlimited discretion in deciding whether to grant a variance. Under the state enabling act the Board is required to reach four conclusions as a prerequisite to the issuance of a variance: (a) unnecessary hardship would result from the strict application of the ordinance. It shall not be necessary to demonstrate that, in the absence of the variance, no reasonable use can be made of the property, (b) the variance is in harmony with the general purpose and intent of the ordinance, preserves its spirit, public safety is secured, and substantial justice is achieved, (c) 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 general public, may not be the basis for granting a variance, (d) the hardship did not result from actions taken by the applicant or owner of the property. 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. In the spaces provided, indicate the facts that you intend to show and the arguments that you intend to make to convince the Board that it can properly reach these four required conclusions:

**Unnecessary Hardship would result from the strict application of the ordinance: State facts and arguments to show that, 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)**

Much of the property is encumbered by the 100 year Flood Zone, in order to limit the amount of fill within the flood zone, we request that the proposed townhomes numbered 1-10 be allowed to be 27' from the centerline of the proposed City street. In order to meet the 35' setback from the centerline of the proposed street, not only would more of the only 100 year Flood Zone be required to be filled but it would require a significant amount of additional material to be hauled in, as the slope of the property steepens as the site moves away from Queen St. and towards Mud Creek.

**The variance is in harmony with the general purpose and intent of the ordinance. preserves its spirit, public safety is secured and substantial justice is achieved. (State facts and arguments to show that, on balance, if the variance is denied, the benefit to the public will be substantially outweighed by the harm suffered by the applicant).**

Homes 1-10 will not have driveways directly off the public street and instead will be accessed via an alley behind the townhomes. This will keep residents from parking between the front of the home and the City street. We have allowed for a 5' sidewalk and 10' landscape buffer between the front of the house and the back of curb.

**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. (State facts and arguments to show that the variance requested represents the least possible deviation from the letter of the ordinance that will allow a reasonable use of the land and that the use of the property, if the variance is granted, will not substantially detract from the character of the neighborhood).**

As discussed previously topography is a significant hardship for this project as well as the City of Hendersonville limitations placed on fill within the 100 yr flood zone.



The hardship did not result from actions taken by the applicant or the property owner. The act of purchasing property with knowledge of circumstances exist that may justify the granting of a variance shall not be regarded as a self-created hardship. (State any facts pertaining to the hardship that is not the result of the applicant's own actions).

The area where the variance is being requested is undeveloped.

I certify that all of the information presented by me in this application is accurate to the best of my knowledge, information and belief.

Signature of Applicant:

Date:

9/2/2022

*Rick Moore*

Signature of Property Owner:

Date:

9/2/2022

*Rick Moore*

In the event that any discrepancies exist between the criteria outlined on this form and the Zoning Ordinance of the City of Hendersonville, the ordinance shall prevail.

Received By:

Date:

Fee Paid:

Date Received:

A VOTE OF SEVEN MEMBERS OF THE BOARD IS REQUIRED TO APPROVE A VARIANCE.







The property being transferred by this Deed does not include the primary residence of the Grantors.

The property hereinabove described was acquired by Grantor by instrument recorded in Book 529, at Page 495, Henderson County, North Carolina Register of Deeds Office.

A map showing the above-described property is recorded in Plat Book \_\_\_\_, at Page \_\_\_\_, and re-indexed in Plat Cabinet \_\_\_\_, at Slide \_\_\_\_, Henderson County, North Carolina Register of Deeds Office.

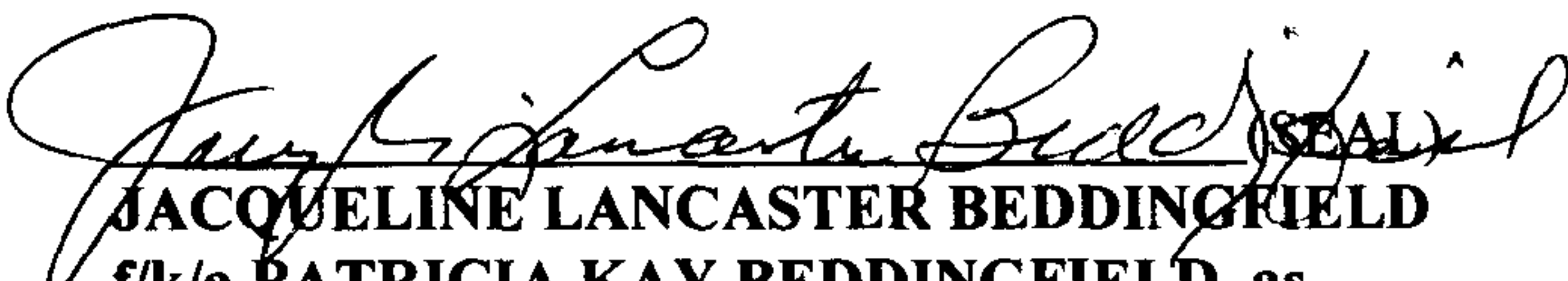
TO HAVE AND TO HOLD the aforesaid lot or parcel of land and all privileges and appurtenances thereto belonging to the Grantee in fee simple.

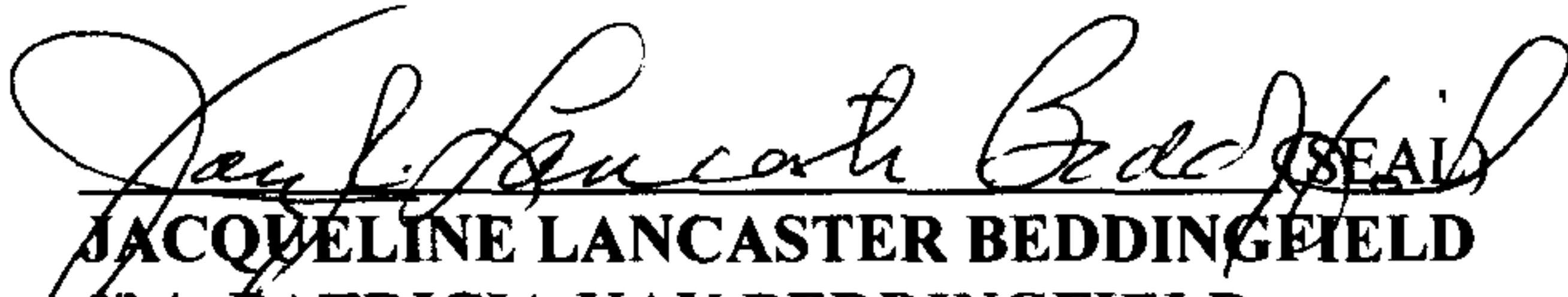
And the Grantor covenants with the Grantee, that Grantor is seized of the premises in fee simple, has the right to convey the same in fee simple, that title is marketable and free and clear of all encumbrances, and that Grantor will warrant and defend the title against the lawful claims of all persons whomsoever, other than the following exceptions:

Henderson County ad valorem taxes for 2022, and subsequent years, which are a lien, but not yet due and payable, easements, rights of way and restrictions of record.

THE REMAINING PORTION OF THIS PAGE LEFT BLANK INTENTIONALLY

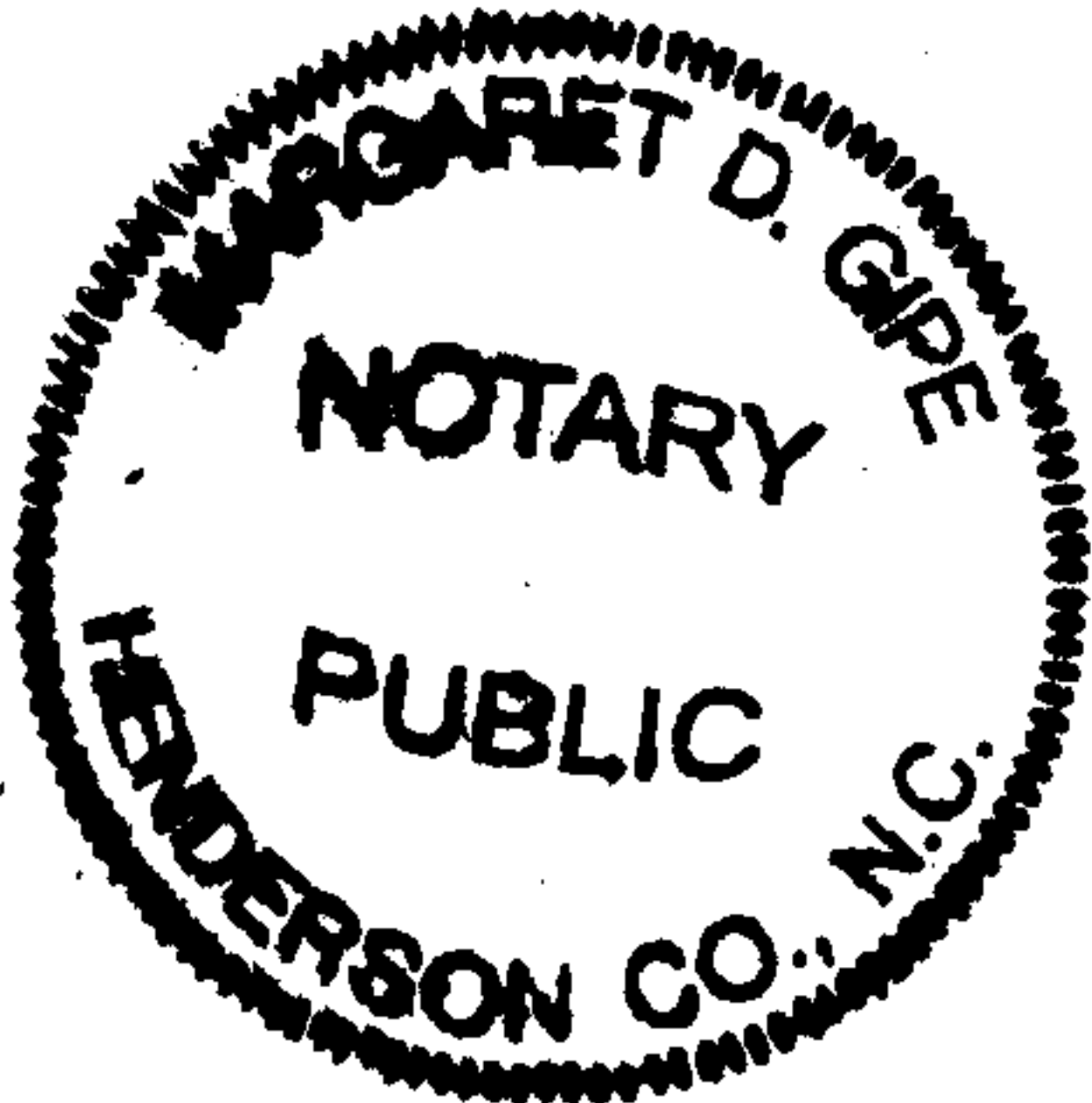
IN WITNESS WHEREOF, the Grantor has duly executed the foregoing as of the day and year first above written.

  
JACQUELINE LANCASTER BEDDINGFIELD  
f/k/a PATRICIA KAY BEDDINGFIELD, as  
Administrator of the ESTATE OF MARTHA  
KATE MAXWELL LANCASTER

  
JACQUELINE LANCASTER BEDDINGFIELD  
f/k/a PATRICIA KAY BEDDINGFIELD

SEAL-STAMP

State of North Carolina – County of Henderson



I, Margaret D. Gipe, the undersigned Notary Public of the County and State aforesaid, certify that JACQUELINE LANCASTER BEDDINGFIELD f/k/a PATRICIA KAY BEDDINGFIELD, Individually and as Administrator of the ESTATE OF MARTHA KATE MAXWELL LANCASTER, Grantors, personally appeared before me this day and acknowledged the due execution of the foregoing instrument for the purposes therein expressed.

Witness my hand and Notarial stamp or seal this 7<sup>th</sup> day of March, 2022.

My Commission Expires:  
9/10/2024

  
Margaret D. Gipe, Notary Public



The property being transferred by this Deed does not include the primary residence of the Grantors.

The property hereinabove described was acquired by Grantor by instrument recorded in Book 529, at Page 495, Henderson County, North Carolina Register of Deeds Office.

A map showing the above-described property is recorded in Plat Book \_\_\_, at Page \_\_\_, and re-indexed in Plat Cabinet \_\_\_, at Slide \_\_\_, Henderson County, North Carolina Register of Deeds Office.

TO HAVE AND TO HOLD the aforesaid lot or parcel of land and all privileges and appurtenances thereto belonging to the Grantee in fee simple.

And the Grantor covenants with the Grantee, that Grantor is seized of the premises in fee simple, has the right to convey the same in fee simple, that title is marketable and free and clear of all encumbrances, and that Grantor will warrant and defend the title against the lawful claims of all persons whomsoever, other than the following exceptions:

Henderson County ad valorem taxes for 2022, and subsequent years, which are a lien, but not yet due and payable, easements, rights of way and restrictions of record.

THE REMAINING PORTION OF THIS PAGE LEFT BLANK INTENTIONALLY

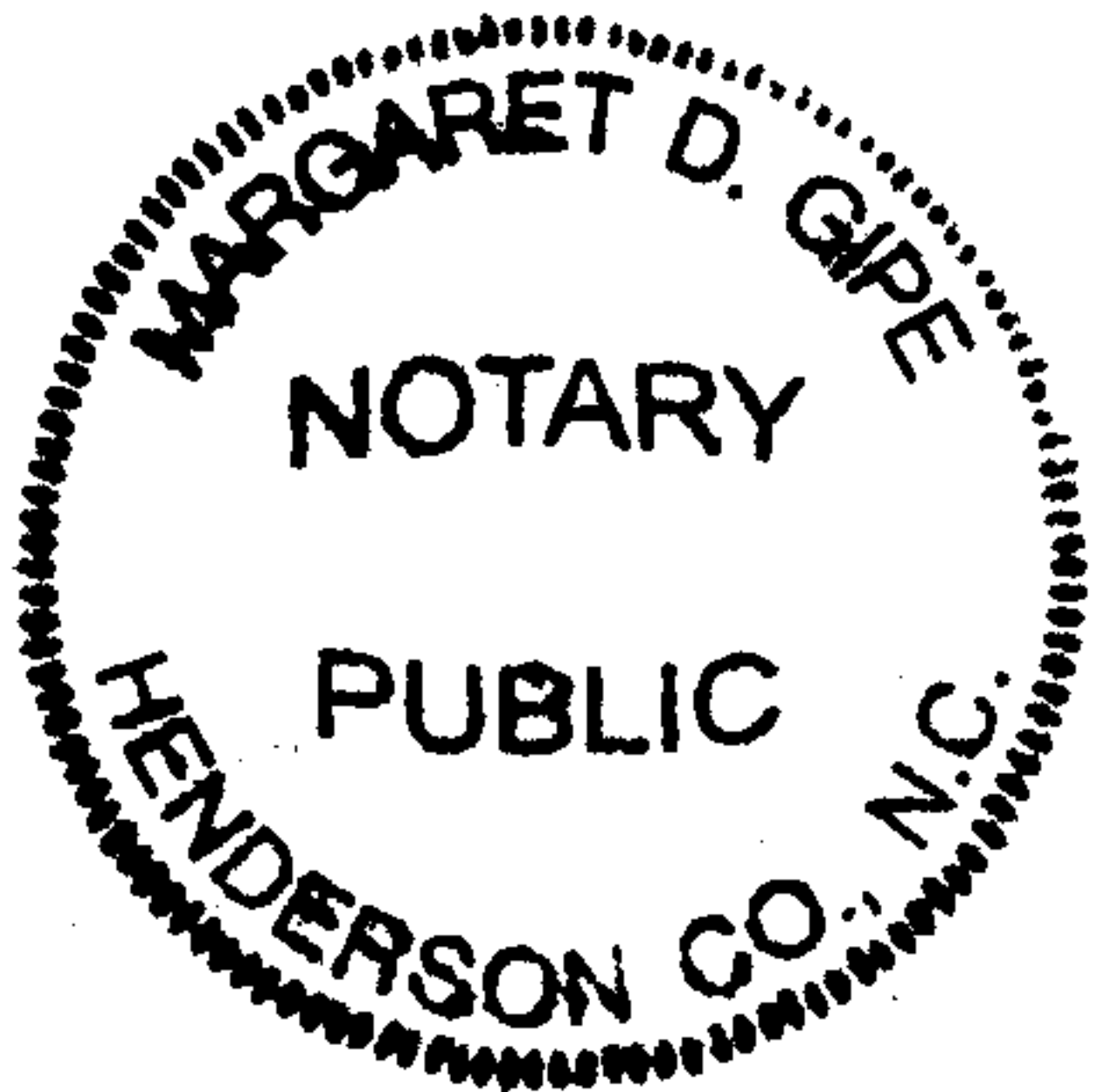
IN WITNESS WHEREOF, the Grantor has duly executed the foregoing as of the day and year first above written.

Stanley Freno Lancaster (SEAL)  
STANLEY FRENO LANCASTER

Elaine Lancaster (SEAL)  
ELAINE LANCASTER

SEAL-STAMP

State of North Carolina – County of Henderson



I, Margaret D. Gipe, the undersigned Notary Public of the County and State aforesaid, certify that **STANLEY FRENO LANCASTER and wife, ELAINE**, Grantors, personally appeared before me this day and acknowledged the due execution of the foregoing instrument for the purposes therein expressed.

Witness my hand and Notarial stamp or seal this 8<sup>th</sup> day of March, 2022.

My Commission Expires:  
9/10/2024

Margaret D. Gipe  
Margaret D. Gipe, Notary Public



EXHIBIT “A”

Being all of the 12.68 acres identified as Tract 1 and all of the 1.52 acres identified as Tract 2 on the “Boundary Survey for: Moore & Son Site Contractors, Inc.” dated March 30, 2022, and recorded in Plat Slide 14126 of the Henderson County Registry. Also being and including all of that real property conveyed to Jack Lancaster and wife, Martha Kate M. Lancaster, by Eula M. Lyda (widow) by deed recorded in Deed Book 458, Page 641, Henderson County Registry.



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DRAWN BY:	WIH
PROJECT #:	21074
ORIGINAL ISSUE DATE:	09/01/2022

PRELIMINARY  
NOT FOR CONSTRUCTION

**Blue Ridge Engineering PLLC**  
924 Main Street - Suite 200  
North Wilkesboro, NC 28659  
336.838.2500  
www.ridge.blue  
Firm #P-0205



Prepared for:  
**MOORE AND SON SITE CONTRACTORS**  
ATTN: Brian Kirk  
103 McDowell Road  
MILLS RIVER, NC 28759  
brian@mooreandson.net

*Concept Layout Plan*  
**Queen Street Townhomes**  
Queen Street  
Hendersonville, NC

SHEET  
**Concept 7.0**

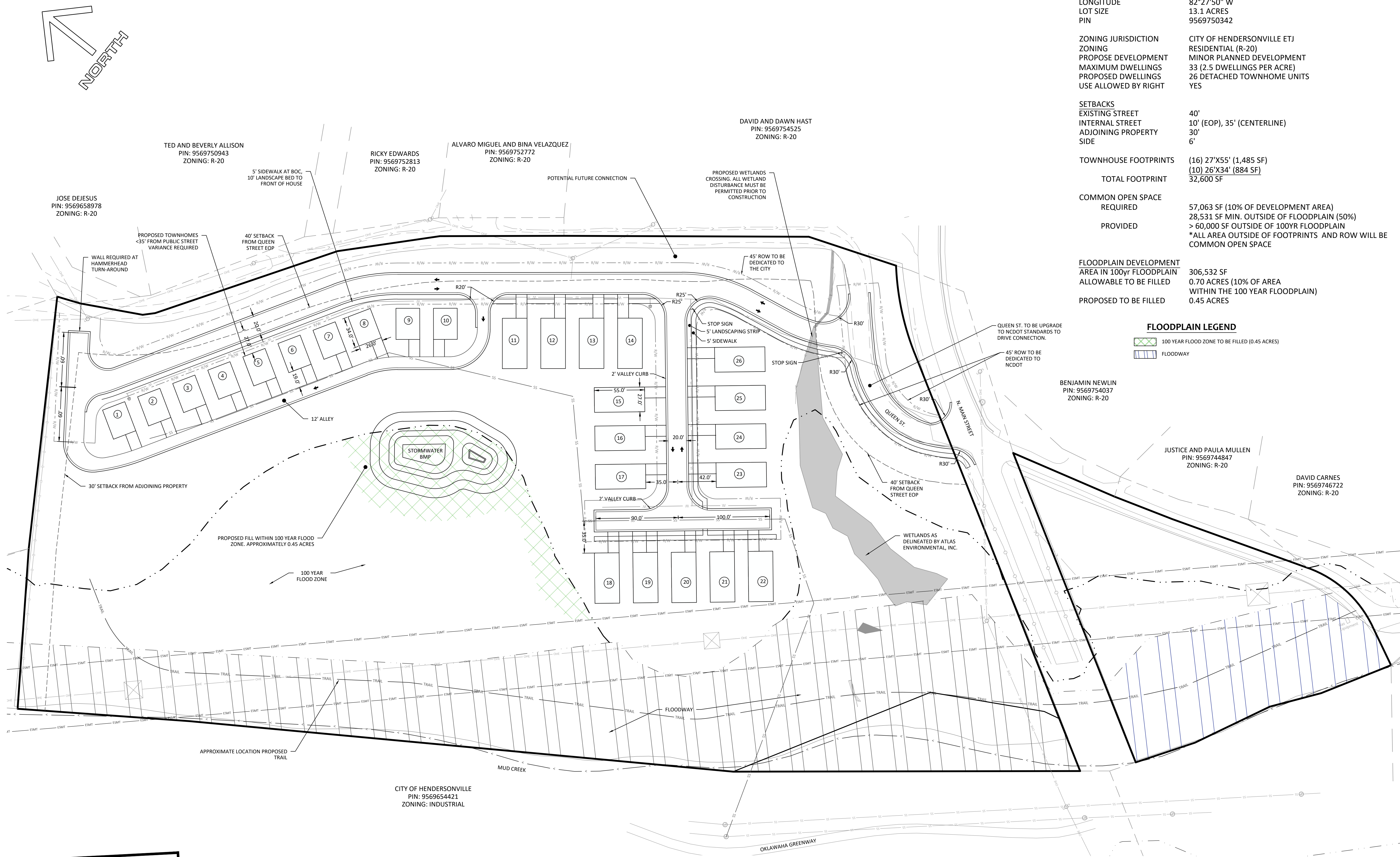
PRELIMINARY - NOT FOR CONSTRUCTION

**ZONING COMPLIANCE DATA**

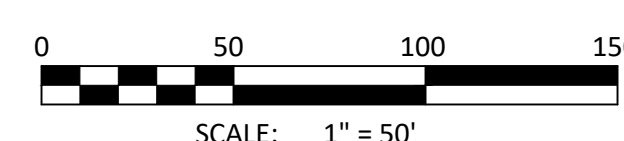
GENERAL	
LATITUDE	35°20'12" N
LONGITUDE	82°27'50" W
LOT SIZE	13.1 ACRES
PIN	9569750342
ZONING JURISDICTION	CITY OF HENDERSONVILLE ETJ
ZONING	RESIDENTIAL (R-20)
PROPOSE DEVELOPMENT	MINOR PLANNED DEVELOPMENT
MAXIMUM DWELLINGS	33 (2.5 DWELLINGS PER ACRE)
PROPOSED DWELLINGS	26 DETACHED TOWNHOME UNITS
USE ALLOWED BY RIGHT	YES
SETBACKS	
EXISTING STREET	40'
INTERNAL STREET	10' (EOP), 35' (CENTERLINE)
ADJOINING PROPERTY	30'
SIDE	6'
TOWNHOUSE FOOTPRINTS	(16) 27'X55' (1,485 SF) (10) 26'X34' (884 SF) 32,600 SF
TOTAL FOOTPRINT	
COMMON OPEN SPACE REQUIRED	57,063 SF (10% OF DEVELOPMENT AREA) 28,531 SF MIN. OUTSIDE OF FLOODPLAIN (50%)
PROVIDED	> 60,000 SF OUTSIDE OF 100YR FLOODPLAIN *ALL AREA OUTSIDE OF FOOTPRINTS AND ROW WILL BE COMMON OPEN SPACE
FLOODPLAIN DEVELOPMENT AREA IN 100yr FLOODPLAIN ALLOWABLE TO BE FILLED	306,532 SF 0.70 ACRES (10% OF AREA WITHIN THE 100 YEAR FLOODPLAIN)
PROPOSED TO BE FILLED	0.45 ACRES

**FLOODPLAIN LEGEND**

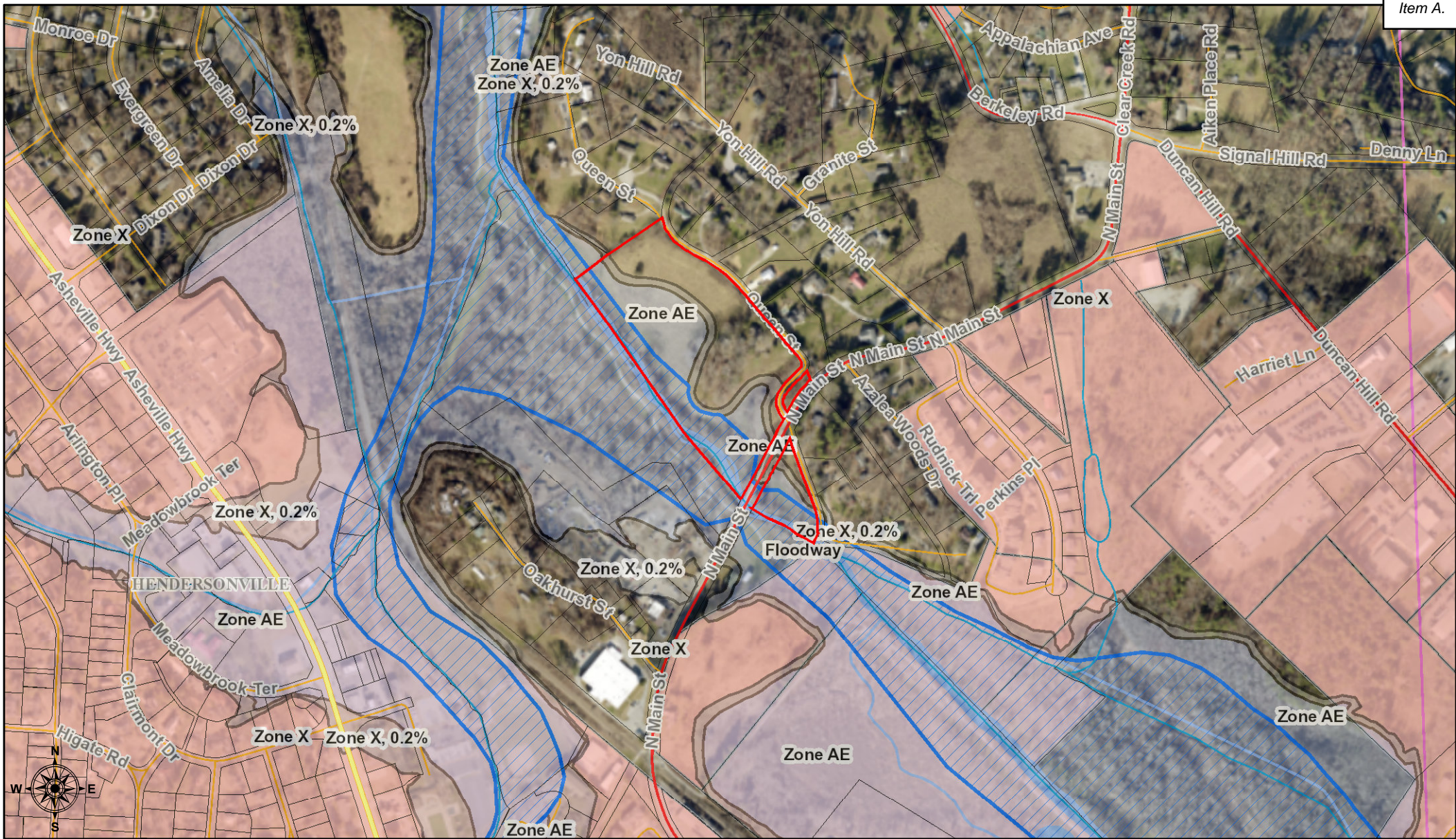
- 100 YEAR FLOOD ZONE TO BE FILLED (0.45 ACRES)
- FLOODWAY



**PRELIMINARY  
FOR REVIEW ONLY  
NOT FOR CONSTRUCTION**







September 22, 2022

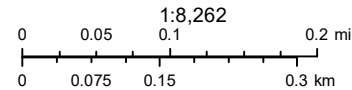
**Streets and Highways**

- FREEWAY
- INTERSTATE
- BOULEVARD

- THOROUGHFARE
- COLLECTOR
- Local Roads
- Parcels

**THIS IS NOT A SURVEY.**

All information or data provided, whether subscribed, purchased or otherwise distributed, whether in hard copy or digital media, shall be at the user's own risk. Henderson County makes no warranties or guarantees, including the warranties of merchantability or of fitness for a particular purpose. Map data is not appropriate for, and is not to be used as, a geodetic, legal, or engineering base system. The data is not intended as a substitute for surveyed locations such as can be determined by a registered Public Land Surveyor, and does not meet the minimum accuracy standards of a Land Information System/Geographic Information System Survey in North Carolina (21 NCAC 56.1608).







View of former home site at center of subject property.



View of Queen St. facing northwest from the current site access with the site of the proposed townhomes (1-10) to the left.





View from northern edge of knoll facing northwest towards proposed location of townhomes 1-10 (units for which variance is requested).



View from edge of floodplain facing south towards Mud Creek.





View from floodplain facing northwest with Mud Creek to the left and overheard powerline easement to the right.



View from floodplain at edge of east edge of knoll facing proposed location of townhomes 1-10. Queen St. in the far background.





View from floodplain facing northeast back toward knoll and existing tree canopy.



## MEMORANDUM

**TO:** Board of Adjustment Members

**FROM:** Community Development Department

**DATE:** October 11, 2022

**RE:** Variance Application –1523 Dawnview Dr.

**SUMMARY:** The Community Development Department has received an application from Maria Lawing for a variance from Section 5-4-3 Dimensional Requirements in accordance with the exception to the minimum front yard requirements in Section 8-1 Minimum Required Front Yard for Dwellings. The subject property is currently zoned R-10, Medium-Density Residential. The specific variance requested is for the following:

**VARIANCE REQUEST:** The Applicant is requesting a variance from the required 25' front setback requirements in Section 5-4-3 to 19'5" for the purpose of constructing a 10' x 14' sunroom on the front of the existing home (*Exhibit A*).

The existing home is 27' from the edge of the right-of-way of Dawnview Dr. Section 8-1 is an exception to the front yard requirements for dwellings if the average front yards of existing buildings fronting the same side of the street is less than the minimum front yard requirement. The average front setback of eight (8) existing homes fronting Dawnview Dr. is 23'5" (*Exhibit C*). The Section 8-1 exception to the minimum front yard requirements allows the Applicant a 23'5" front setback. With the Section 8-1 exception, the Applicant is requesting to encroach a total of 4'5" into the front setback to construct a 10' x 14' sunroom.

### PROPOSED FINDINGS OF FACT:

- Based on Henderson County records the subject property possesses a PIN of 9569-33-8202 and is zoned as R-10 Medium Density Residential.
- Based on Henderson County records, the lot size is approximately 0.2 acres or 8,712 square feet.
- Based on Henderson County records a North Carolina General Warranty Deed between Michael C. Anderson and Paula G. Anderson (Grantor) and Maria B. Lawing (Grantee) was recorded on June 20, 2013. (*Exhibit B*).
- Section 5-4-3 requires the Principal Structure setbacks for R-10 are:
  - Front: 25'
  - Side: 10'
  - Rear: 10'



- Based on Section 8-1 of the Zoning Ordinance exception to the front yard requirements for dwellings and the average front setbacks of eight (8) existing homes fronting Dawnview Dr. allows the Applicant's a front setback of 23'5" (*Exhibit C*).
- Based on the Variance Application (*Exhibit A*), the Applicant is proposing to construct a 10' x 14' sunroom on the front of the existing home to accommodate a person with a disability.
- Section 10-9(2) of the Zoning Ordinance states that a variance may be granted when necessary and appropriate to make a reasonable accommodation under the Federal Fair Housing Act for a person with a disability.
- Under the Federal Fair Housing Act a reasonable accommodation is a change, exception, or adjustment to a rule, policy, practice, or service (*Exhibit D*).

### CODE REFERENCES.

#### 5-4-3 Dimensional Requirements:

Minimum Lot Area in Square Feet:	10,000
Lot Area per Dwelling Unit in Square Feet:	10,000 for the first; 5,000 square feet for one additional dwelling unit in one building.
Minimum Lot Width at Building Line in Feet:	75
Minimum Yard Requirements in Feet:	
Front:	25
Side:	10
Rear:	10
Accessory Structures:	
Front:	25
Side:	5
Rear:	5
Maximum Height in Feet:	35

**Section 8-1 Minimum Required Front Yard for Dwellings.** The minimum required front yard requirements of this Ordinance for dwellings shall not apply on any lot where the average front yard of existing buildings located wholly or in part within 100 feet on each side of such lot within the same block and zoning district and fronting on the same side of the street is less than the minimum required front yard. In such cases, front yard on such lot may be less than the required front yard, but not less than the average of the front yards of the aforementioned existing buildings.



### **Section 10-9 Variance.**

A Variance is a means whereby the City may grant relief from the effect of the Zoning Ordinance in cases of hardship. A Variance constitutes permission to depart from the literal requirements of the ordinance. When unnecessary hardships would result from carrying out the strict letter of a zoning ordinance, the Board of Adjustment shall vary any of the provisions of the ordinance upon a showing of the following:

- 1) Unnecessary hardship would result from the strict application of the ordinance. It is not 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. A Variance may be granted when necessary and appropriate to make a reasonable accommodation under the Federal Fair Housing Act for a person with a disability.
- 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 is not a self-created hardship.
- 4) The requested Variance is consistent with the spirit, purpose, and intent of the regulation, such that public safety is secured and substantial justice is achieved.

The Board of Adjustment shall not have authority to grant a Variance when to do so would:

- 1) result in the extension of a nonconformity regulated pursuant to Section 6-2, above, or
- 2) permit a use of land, building or structure which is not permitted within the applicable zoning district classification. Per NCGS 160D-705 (d), appropriate conditions may be imposed on any Variance, provided that the conditions are reasonably related to the Variance.



**MOTION:**

*With regard to the request by Maria Lawing for a variance from Section 5-4-3: Dimensional Requirements to:*

- 1) Reduce the front setback requirement from 25' to 19'5" for the construction of a 10' x 14' sunroom.

*I move the Board to find that (a) strict enforcement of the regulations would result in practical difficulties or unnecessary hardship to the applicant, (b) the variance is in harmony with the general purpose and intent of the ordinance and preserves its spirit, and (c) in the granting of the variance the public safety and welfare have been secured and substantial justice has been done.*

**(After the motion has been seconded, the movant should state the factual basis and reasoning for the motion. In doing so, bear in mind the considerations set out in Section 10-9 of the zoning ordinance.)**

Remember: Staff suggest the motion be made in the affirmative regardless of whether it is your intention to support or oppose the issuance of a variance. This does not mean that staff is recommending approval of the application. RATHER, we believe it is better procedurally to approach it this way. Once you have made the motion, you should state your position as to the required findings. For variance applications, it takes seven affirmative votes to approve this application, if others are voicing support of the application, you should make it a point to state your position vis-à-vis the required findings since your vote, even standing by itself may represent the position of the Board.



## **EXHIBITS**

**Exhibit A – Application and Site Plan**

**Exhibit B – Warranty Deed**

**Exhibit C – Average Front Setbacks Table**

**Exhibit D – Federal Fair Housing Act**





**CITY OF HENDERSONVILLE  
COMMUNITY DEVELOPMENT DEPARTMENT**

100 N. King Street, Hendersonville, NC 28792

Phone (828) 697-3010 | Fax (828) 698-6185

[www.hendersonvillenc.gov](http://www.hendersonvillenc.gov)

**APPLICATION FOR A VARIANCE**

**Section 10-9 City Zoning Ordinance**

The following information is **required** to be submitted prior to review by the Administrative Officer for placement on the Board of Adjustment agenda. Staff will not review applications until each item has been submitted and determined complete. Once the Administrative Officer is in receipt of a complete application, the Administrative Officer will schedule the application for an Evidentiary Hearing before the Board of Adjustment (*Section 10-8-3*).

The Board of Adjustment meets the second Tuesday of each month at 1:30PM at the Operations Center located at 305 Williams Street. Completed applications must be submitted to the Administrative Officer no later than the second Friday of each month, to be included on the following month's agenda.

The Board of Adjustment shall conduct an Evidentiary Hearing (quasi-judicial hearing) on the application. Per NCGS 160D-406(d), the applicant, the local government, and any person who would have standing under NCGS 160D-1402(c), shall have the right to participate as a party at the Evidentiary Hearing. Other witnesses may present, competent, material, and substantial evidence that is not repetitive as allowed by the board (*Section 10-8-3*).

The City Zoning Ordinance can be found on the City of Hendersonville Community Development website: [www.hendersonvillenc.gov/community-development](http://www.hendersonvillenc.gov/community-development)

By placing a check mark by each of the following items, you are certifying that you have performed that task.

- ☐ 1. Pre-application meeting with the Planning staff.
- ☒ 2. Completed Variance Application
- ☒ 3. Completed Zoning Permit Application
- ☒ 4. Site Plan of property showing any existing structures, natural features (e.g. streams, ponds, etc.), **as well as** the proposed building or additions indicating distance from such to the centerline of street, side & rear lot lines, and elevations, as applicable, and placement of septic system & drainage field with distances from structures, if applicable.
- ☐ 5. One copy of the septic permit (if applicable)
- ☒ 6. Application Fee of \$75.00
- ☒ 7. Petitioner has checked for Homeowner Association rules, property covenants, deed restrictions, Building Safety Department permits, and other requirements that might have a bearing on the application.

Office Use:

Date Received: \_\_\_\_\_ By: \_\_\_\_\_ Fee Received? Y/N



### A. Quasi-Judicial Process

The Board of Adjustment is given the authority under Section 10-3 of the Zoning Ordinance of the City of Hendersonville to hear and decide requests for variances from the dimensional requirements of the Zoning Ordinance in accordance with Section 10-9. The Board conducts quasi-judicial hearings and may consider sworn testimony and evidence presented during the hearing. Applicants are advised to bring data or experts in the relevant field to provide fact-based evidence to support any information they want considered. The Board may not consider personal opinions, subjective observations, or personal preferences.

**NOTE: The City Planning staff may not provide legal advice to applicants. Applicants are encouraged to consult the appropriate sections of the North Carolina General Statutes, City of Hendersonville Zoning Ordinance, and the Rules of Procedure for the Board of Adjustment, or to consult with an attorney, if more information is needed.**

### B. Property Information

Name of Project: \_\_\_\_\_

PIN(s): 9569338202

Address(es) / Location of Property: 1523 dawnview drive  
hendersonville nc 28791

Type of Development:   X  Residential        Commercial        Other

Current Zoning: cities

Total Acreage: .23

### C. To the Zoning Board of Adjustment

I, maria b lawing, hereby petition the Board of Adjustment for a variance(s) from the literal provisions of the Zoning Ordinance of the City of Hendersonville because I am prohibited from using the parcel of land described in the form "Zoning Permit Applicant" in a manner shown by the Site Plan.

I request a Variance from the following provision(s) of the ordinance (cite section numbers):

\_\_\_\_\_



## D. Variance Burden of Proof

When unnecessary hardships would result from carrying out the strict application of a zoning ordinance, the Board of Adjustment shall vary any of the provisions upon a showing of the factors listed below. The Board **does not** have unlimited discretion in deciding whether to grant a variance. Under the state enabling act, the Board shall grant a variance **only upon showing of all of the factors** below as provided in Section 10-9 of the City of Hendersonville Zoning Ordinance.

**Instructions:** *In the spaces provided below, indicate the **facts you intend to demonstrate** and **the arguments that you intend to make** to demonstrate to the Board that it can properly grant the variance as provided in Section 10-9 of the City of Hendersonville Zoning Ordinance. (If additional space is required, please provide the information on a separate sheet of paper).*

1. Unnecessary hardship would result from the strict application of the ordinance. In order to determine whether an unnecessary hardship exists, the Applicant must demonstrate the following factors:

- a. Indicate how an unnecessary hardship would result from the strict application of the ordinance. It is not necessary to demonstrate, that in the absence of the variance, no reasonable use can be made of the property.

i am an AFL (alternate family living) provider for Angie Smith my friend of 14 years she has mobility issues and mental challenges due to her cerebral palsy having the addition would allow her to have social interaction with the neighbors.

- b. Indicate how 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. A variance may be granted when necessary and appropriate to make a reasonable accommodation under the Federal Fair Housing Act for a person with a disability.

the addition would allow Angie to independently and safely transition from our livingroom in her wheelchair this would allow her to be outside without the issues of too much sun exposure, bugs and health or safety concerns.



- c. Indicate how the hardship did not result from actions taken by the applicant or property owner. The act of purchasing property with knowledge that circumstances exist that may justify the granting of a variance is not a self-created hardship.

i purchased the property 10 years ago with no foreknowledge that i would be removing Angie from the group home she had lived in for 33 years to come live with me however covid shut down the group home and after 7 months of zero contact with her they also stated it could be up to 2 years before they would allow anyone to see her i ask her mother if she could live with me and the rest is history. so with all that said i had no idea building an addition onto the front would require a variance.

2. Indicate how the requested variance is consistent with the spirit, purpose, and intent of the regulation, such that public safety is secured, and substantial justice is achieved.

I'm not sure how to answer this i do not feel it will cause a public safety issue. only 1 of my neighbors meet the variance.



**E. Applicant Contact Information**

maria b lawing  
\* **Printed Applicant Name**

\_\_\_\_\_  
**Printed Company Name (if applicable)**

☐ **Corporation**      ☐ **Limited Liability Company**      ☐ **Trust**      ☐ **Partnership**

☐ **Other:** \_\_\_\_\_

☐ By signature below, I hereby acknowledge, as/on behalf of (circle one) the Applicant named above my understanding this application will be considered in a quasi-judicial proceeding and that neither I, nor anyone on my behalf, may contact the Board of Adjustment except through sworn testimony at the public hearing. (Applicable if box is checked.)

\_\_\_\_\_  
**Applicant Signature**

\_\_\_\_\_  
**Applicant Title (if applicable)**

\_\_\_\_\_  
**Address of Applicant**

\_\_\_\_\_  
**City, State, and Zip Code**

\_\_\_\_\_  
**Telephone**

\_\_\_\_\_  
**Email**



**F. Owner Contact Information (if different from Applicant)**

\* ^ **Printed Owner Name**

\* ^ **Printed Company Name (if applicable)**

☐ **Corporation**      ☐ **Limited Liability Company**      ☐ **Trust**      ☐ **Partnership**

☐ **Other:** \_\_\_\_\_

☐ By signature below, I hereby acknowledge, as/on behalf of (circle one) the Applicant named above my understanding this application will be considered in a quasi-judicial proceeding and that neither I, nor anyone on my behalf, may contact the Board of Adjustment except through sworn testimony at the public hearing. (Applicable if box is checked.)

\_\_\_\_\_  
**Owner Signature**

\_\_\_\_\_  
**Owner Title (if applicable)**

1523 dawnview drive

\_\_\_\_\_  
**Address of Property Owner**

Hendersonville nc 28791

\_\_\_\_\_  
**City, State, and Zip Code**

828-674-5871

\_\_\_\_\_  
**Telephone**

marialawing1523@gmail.com

\_\_\_\_\_  
**Email**

\* Property owner hereby grants permission to the City of Hendersonville personnel to enter the subject property for any purpose required in processing this application.

^ If signed by an agent on behalf of the Owner, this petition MUST be accompanied by a Limited Power of Attorney signed by the property owner (s) and notarized, specifically authorizing the agent to act on the owner (s) behalf in signing this application. Failure of each owner, or their duly authorized agent, to sign, or failure to include the authority of the agent signed by the property owner, will result in an INVALID APPLICATION.



## Certification

In granting a variance, the Board of Adjustment may prescribe appropriate conditions and safeguards in conformity with the City of Hendersonville Zoning Code. Violations of the provisions of the variance granted, including any conditions or safeguards, which are part of the granting of the variance, shall be deemed in violation of the City of Hendersonville Zoning Ordinance.

I, maria b lawing, hereby certify that all of the information set forth above is true and accurate to the best of my knowledge.

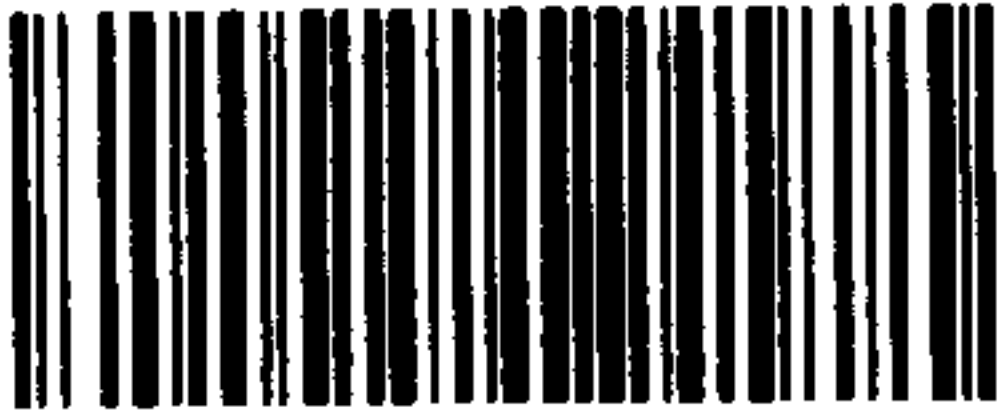
9-29-2022  
Date

maria b lawing  
Applicant Signature

homeowner  
Applicant Title

maria b lawing  
Applicant Name (Please Print)





This document presented and filed:  
06/20/2013 12:36:17 PM



NEDRA W. MOLES, Henderson COUNTY, NC  
Transfer Tax: \$184.00

Doc Stamps \$ 184.<sup>00</sup> *↓*  
*Callie Law Firm*

Prepared by: Kenneth Youngblood  
Deed Preparation Only

STATE OF NORTH CAROLINA  
COUNTY OF HENDERSON

GENERAL WARRANTY DEED

THIS DEED, made and entered into this 20<sup>th</sup> day of June, 2013, by and between Michael C. Anderson, and wife, Paula G. Anderson having a mailing address of 30 Anchor Road, Lynn, MA 01904 (herein collectively referred to as the "parties of the first part") and Maria B. Lawing, Single (the "party of the second part" and having a mailing address of: 1523 Dawnview Drive, Hendersonville, North Carolina 28791);

WITNESSETH:

WHEREAS, John A. Bessellieu died Intestate on the 8<sup>th</sup> day of November, 1992, owning the hereinafter described real property; and,

WHEREAS, Evelyn Dean Bessellieu was the surviving spouse of John A. Bessellieu; and,

WHEREAS, there were no children born to John A. Bessellieu or Evelyn Dean Bessellieu; and,

WHEREAS, hereinafter described real property passed to Evelyn Dean Bessellieu; and,

WHEREAS, the said Evelyn Dean Bessellieu died Testate on the 6<sup>th</sup> day of January, 2013 owning the hereinafter described real property; and,

WHEREAS, the Last Will and Testament of the said Evelyn Dean Bessellieu has been duly admitted to probate in the Office of the Clerk of Superior Court, General Court of Justice, Henderson County, North Carolina, under File No. 13-E-47; and,

WHEREAS, Barbara Blaine has been duly qualified and is serving as Executrix of the Estate of Evelyn Dean Bessellieu; and,

WHEREAS, the Creditors' Notice was published in the Hendersonville Tribune, a newspaper of general circulation in Henderson County, North Carolina, as required by law, on January 24<sup>th</sup>, 31<sup>st</sup>, February 7<sup>th</sup>, and February 14<sup>th</sup>, 2013; and,

WHEREAS, under the terms of the Last Will and Testament of the said Evelyn Dean Bessellieu, the hereinafter described property was devised to Michael C. Anderson; and,

The said parties of the first part, for and in consideration of the sum of Ninety Two Thousand and no/100's (\$92,000.00) and Other Valuable Consideration to them in hand paid by the said party of the second part, the receipt of which is hereby acknowledged, has bargained and sold, and by these presents does bargain, sell, and convey in fee



simple unto the said party of the second part, her heirs and assigns, a certain tract or parcel of land lying in Henderson County, North Carolina, more particularly described as follows:

BEGINNING at an iron pin on the west margin of Dawnview Drive, the northeast corner of that tract of land conveyed by Earl T. Brown et ux to J.D. Whiteside et als, by deed recorded in Deed Book 355, at page 539, in the Office of the Register of Deeds for Henderson County, North Carolina, and runs thence with the north line of said tract, North 86 Degrees 50 Minutes West 100 feet to a stake in the Amos Bennett line: thence with the same, South 3 Degrees 10 Minutes West 90 Feet to a stake in said line; thence South 86 Degrees 50 Minutes East 100 Feet to a stake in the west margin of Dawnview Drive; thence with the same, North 3 Degrees 10 Minutes East 90 Feet to the BEGINNING.

The foregoing property is the northern portion of that property conveyed to J.D. Whiteside, et als, by E.T. Brown, et ux, by deed recorded in Deed Book 355, at page 539, and is also the northern portion of Lot No. 1 of the E.T. Brown Subdivision, as will be shown by reference to plat recorded in Plat Book 6, at page 53, in the office of the Register of Deeds for Henderson County, North Carolina.

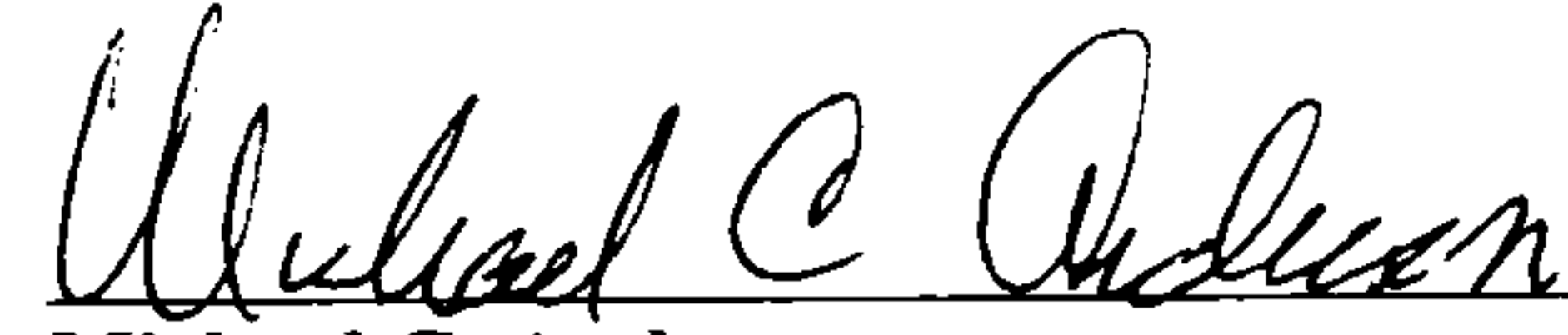
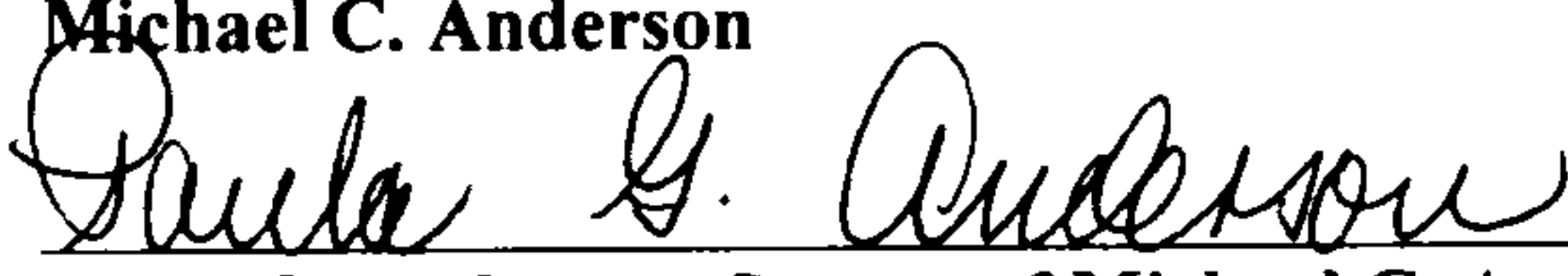
Also being that property conveyed to John A. Bessellieu that was recorded in Deed Book 443, Page 499, Henderson County Registry.

The real property conveyed herein does not includes the primary residence of the grantors.

TO HAVE AND TO HOLD the aforesaid tract or parcel of land, together with all privileges and appurtenances thereunto belonging to them, the said party of the second part, and her heirs and assigns in fee simple forever.

And said parties of the first part does covenant that they have seized of said lands in fee simple and has the right to convey the same in fee simple, that title to same is marketable and free and clear of all encumbrances, and that they will warrant and defend the title herein conveyed against the lawful claims of all persons whomsoever; and to 2013 Henderson County ad valorem property taxes.

IN TESTIMONY WHEREOF, said parties of the first part has hereunto set their respective hands and seals this day and year first above written.

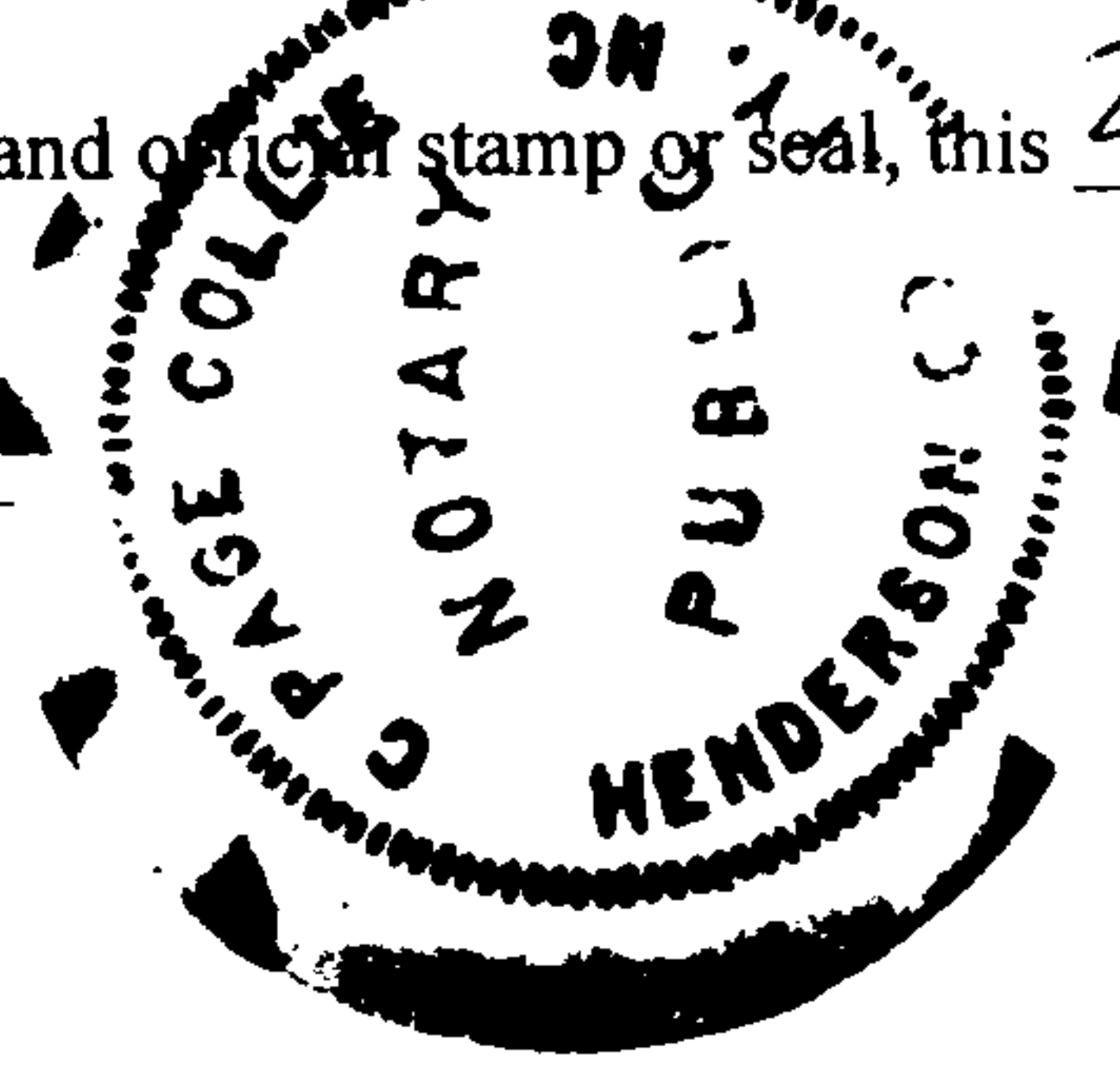
 (SEAL)  
Michael C. Anderson  
 (SEAL)  
Paula G. Anderson, Spouse of Michael C. Anderson

STATE OF NORTH CAROLINA  
COUNTY OF HENDERSON

I, a Notary Public of the County and State aforesaid, certify that Michael C. Anderson, personally appeared before me this day and acknowledged the voluntary execution of the foregoing instrument for the purpose stated therein.

Witness my hand and official stamp or seal, this 20<sup>th</sup> day of June, 2013.

My Commission Expires: 05/06/2017

 C. Page Collier  
Notary Public C. Page Collier



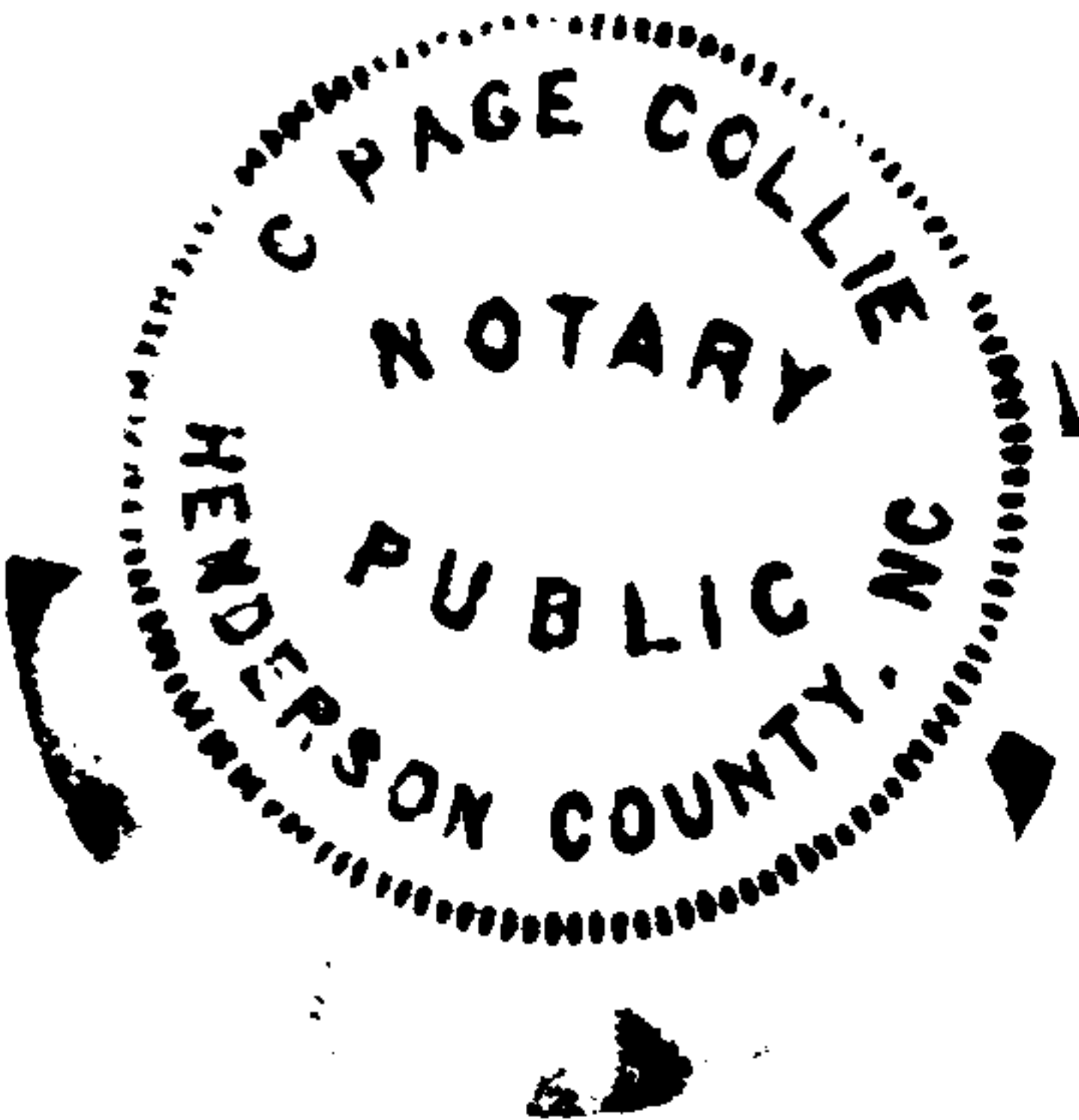
STATE OF NORTH CAROLINA  
COUNTY OF HENDERSON

I, a Notary Public of the County and State aforesaid, certify that Paula G. Anderson, personally appeared before me this day and acknowledged the voluntary execution of the foregoing instrument for the purpose stated therein.

Witness my hand and official stamp or seal, this 20<sup>th</sup> day of June, 2013.

My Commission Expires:  
05/06/2017

*C. Page Collie*  
Notary Public *C. Page Collie*





<u>Dawnview Setbacks witin 100' of 1523 Dawnview</u>		
Addresses	1521	24
	1732	23
	1516	25
	1518	15
	1525	27
	1527	27
	1520	24
	1522	23
	Average	23.5
	Subject Property	27
	<b>Permitted Front Setback</b>	<b>23.5</b>
	Notes:	
	- Measurements in Feet	
	- ROW is 20' wide	
	- Measurements taken from center of pavement	
	- 10' was subtracted from each measurement to establish the setback	





U.S. DEPARTMENT OF JUSTICE  
CIVIL RIGHTS DIVISION



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
OFFICE OF FAIR HOUSING AND EQUAL OPPORTUNITY

Washington, D.C.  
May 17, 2004

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**JOINT STATEMENT OF  
THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
AND THE DEPARTMENT OF JUSTICE**

***REASONABLE ACCOMMODATIONS UNDER THE  
FAIR HOUSING ACT***

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**Introduction**

The Department of Justice ("DOJ") and the Department of Housing and Urban Development ("HUD") are jointly responsible for enforcing the federal Fair Housing Act<sup>1</sup> (the "Act"), which prohibits discrimination in housing on the basis of race, color, religion, sex, national origin, familial status, and disability.<sup>2</sup> One type of disability discrimination prohibited by the Act is the refusal to make reasonable accommodations in rules, policies, practices, or services when such accommodations may be necessary to afford a person with a disability the equal opportunity to use and enjoy a dwelling.<sup>3</sup> HUD and DOJ frequently respond to complaints alleging that housing providers have violated the Act by refusing reasonable accommodations to persons with disabilities. This Statement provides technical assistance regarding the rights and obligations of persons with disabilities and housing providers under the Act relating to

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<sup>1</sup> The Fair Housing Act is codified at 42 U.S.C. §§ 3601 - 3619.

<sup>2</sup> The Act uses the term "handicap" instead of the term "disability." Both terms have the same legal meaning. See *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998) (noting that definition of "disability" in the Americans with Disabilities Act is drawn almost verbatim "from the definition of 'handicap' contained in the Fair Housing Amendments Act of 1988"). This document uses the term "disability," which is more generally accepted.

<sup>3</sup> 42 U.S.C. § 3604(f)(3)(B).



reasonable accommodations.<sup>4</sup>

## **Questions and Answers**

### **1. What types of discrimination against persons with disabilities does the Act prohibit?**

The Act prohibits housing providers from discriminating against applicants or residents because of their disability or the disability of anyone associated with them<sup>5</sup> and from treating persons with disabilities less favorably than others because of their disability. The Act also makes it unlawful for any person to refuse “to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford ... person(s) [with disabilities] equal opportunity to use and enjoy a dwelling.”<sup>6</sup> The Act also prohibits housing providers from refusing residency to persons with disabilities, or placing conditions on their residency, because those persons may require reasonable accommodations. In addition, in certain circumstances, the Act requires that housing providers allow residents to

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<sup>4</sup> Housing providers that receive federal financial assistance are also subject to the requirements of Section 504 of the Rehabilitation Act of 1973. 29 U.S.C. § 794. Section 504, and its implementing regulations at 24 C.F.R. Part 8, prohibit discrimination based on disability and require recipients of federal financial assistance to provide reasonable accommodations to applicants and residents with disabilities. Although Section 504 imposes greater obligations than the Fair Housing Act, (e.g., providing and paying for reasonable accommodations that involve structural modifications to units or public and common areas), the principles discussed in this Statement regarding reasonable accommodation under the Fair Housing Act generally apply to requests for reasonable accommodations to rules, policies, practices, and services under Section 504. See U.S. Department of Housing and Urban Development, Office of Public and Indian Housing, Notice PIH 2002-01(HA) ([www.hud.gov/offices/fheo/disabilities/PIH02-01.pdf](http://www.hud.gov/offices/fheo/disabilities/PIH02-01.pdf)) and “Section 504: Frequently Asked Questions,” ([www.hud.gov/offices/fheo/disabilities/sect504faq.cfm#anchor272118](http://www.hud.gov/offices/fheo/disabilities/sect504faq.cfm#anchor272118)).

<sup>5</sup> The Fair Housing Act’s protection against disability discrimination covers not only home seekers with disabilities but also buyers and renters without disabilities who live or are associated with individuals with disabilities 42 U.S.C. § 3604(f)(1)(B), 42 U.S.C. § 3604(f)(1)(C), 42 U.S.C. § 3604(f)(2)(B), 42 U.S.C. § (f)(2)(C). See also H.R. Rep. 100-711 – 24 (reprinted in 1988 U.S.C.A.N. 2173, 2184-85) (“The Committee intends these provisions to prohibit not only discrimination against the primary purchaser or named lessee, but also to prohibit denials of housing opportunities to applicants because they have children, parents, friends, spouses, roommates, patients, subtenants or other associates who have disabilities.”). *Accord*: Preamble to Proposed HUD Rules Implementing the Fair Housing Act, 53 Fed. Reg. 45001 (Nov. 7, 1988) (citing House Report).

<sup>6</sup> 42 U.S.C. § 3604(f)(3)(B). HUD regulations pertaining to reasonable accommodations may be found at 24 C.F.R. § 100.204.



make reasonable structural modifications to units and public/common areas in a dwelling when those modifications may be necessary for a person with a disability to have full enjoyment of a dwelling.<sup>7</sup> With certain limited exceptions (*see* response to question 2 below), the Act applies to privately and publicly owned housing, including housing subsidized by the federal government or rented through the use of Section 8 voucher assistance.

## **2. Who must comply with the Fair Housing Act's reasonable accommodation requirements?**

Any person or entity engaging in prohibited conduct – *i.e.*, refusing to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a person with a disability an equal opportunity to use and enjoy a dwelling – may be held liable unless they fall within an exception to the Act's coverage. Courts have applied the Act to individuals, corporations, associations and others involved in the provision of housing and residential lending, including property owners, housing managers, homeowners and condominium associations, lenders, real estate agents, and brokerage services. Courts have also applied the Act to state and local governments, most often in the context of exclusionary zoning or other land-use decisions. *See e.g., City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 729 (1995); *Project Life v. Glendening*, 139 F. Supp. 703, 710 (D. Md. 2001), *aff'd* 2002 WL 2012545 (4<sup>th</sup> Cir. 2002). Under specific exceptions to the Fair Housing Act, the reasonable accommodation requirements of the Act do not apply to a private individual owner who sells his own home so long as he (1) does not own more than three single-family homes; (2) does not use a real estate agent and does not employ any discriminatory advertising or notices; (3) has not engaged in a similar sale of a home within a 24-month period; and (4) is not in the business of selling or renting dwellings. The reasonable accommodation requirements of the Fair Housing Act also do not apply to owner-occupied buildings that have four or fewer dwelling units.

## **3. Who qualifies as a person with a disability under the Act?**

The Act defines a person with a disability to include (1) individuals with a physical or mental impairment that substantially limits one or more major life activities; (2) individuals who are regarded as having such an impairment; and (3) individuals with a record of such an impairment.

The term "physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, Human Immunodeficiency Virus infection, mental retardation, emotional illness, drug addiction (other than addiction caused by current, illegal use of a controlled substance) and alcoholism.

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<sup>7</sup> This Statement does not address the principles relating to reasonable modifications. For further information see the HUD regulations at 24 C.F.R. § 100.203. This statement also does not address the additional requirements imposed on recipients of Federal financial assistance pursuant to Section 504, as explained in the Introduction.



The term "substantially limits" suggests that the limitation is "significant" or "to a large degree."

The term "major life activity" means those activities that are of central importance to daily life, such as seeing, hearing, walking, breathing, performing manual tasks, caring for one's self, learning, and speaking.<sup>8</sup> This list of major life activities is not exhaustive. *See e.g., Bragdon v. Abbott*, 524 U.S. 624, 691-92 (1998)(holding that for certain individuals reproduction is a major life activity).

**4. Does the Act protect juvenile offenders, sex offenders, persons who illegally use controlled substances, and persons with disabilities who pose a significant danger to others?**

No, juvenile offenders and sex offenders, by virtue of that status, are not persons with disabilities protected by the Act. Similarly, while the Act does protect persons who are recovering from substance abuse, it does not protect persons who are currently engaging in the current illegal use of controlled substances.<sup>9</sup> Additionally, the Act does not protect an individual with a disability whose tenancy would constitute a "direct threat" to the health or safety of other individuals or result in substantial physical damage to the property of others unless the threat can be eliminated or significantly reduced by reasonable accommodation.

**5. How can a housing provider determine if an individual poses a direct threat?**

The Act does not allow for exclusion of individuals based upon fear, speculation, or stereotype about a particular disability or persons with disabilities in general. A determination that an individual poses a direct threat must rely on an individualized assessment that is based on reliable objective evidence (*e.g.*, current conduct, or a recent history of overt acts). The assessment must consider: (1) the nature, duration, and severity of the risk of injury; (2) the probability that injury will actually occur; and (3) whether there are any reasonable accommodations that will eliminate the direct threat. Consequently, in evaluating a recent history of overt acts, a provider must take into account whether the individual has received intervening treatment or medication that has eliminated the direct threat (*i.e.*, a significant risk of substantial harm). In such a situation, the provider may request that the individual document

<sup>8</sup> The Supreme Court has questioned but has not yet ruled on whether "working" is to be considered a major life activity. *See Toyota Motor Mfg. Kentucky, Inc. v. Williams*, 122 S. Ct. 681, 692, 693 (2002). If it is a major activity, the Court has noted that a claimant would be required to show an inability to work in a "broad range of jobs" rather than a specific job. *See Sutton v. United Airlines, Inc.*, 527 U.S. 470, 492 (1999).

<sup>9</sup> *See, e.g., United States v. Southern Management Corp.*, 955 F.2d 914, 919 (4<sup>th</sup> Cir. 1992) (discussing exclusion in 42 U.S.C. § 3602(h) for "current, illegal use of or addiction to a controlled substance").



how the circumstances have changed so that he no longer poses a direct threat. A provider may also obtain satisfactory assurances that the individual will not pose a direct threat during the tenancy. The housing provider must have reliable, objective evidence that a person with a disability poses a direct threat before excluding him from housing on that basis.

**Example 1:** A housing provider requires all persons applying to rent an apartment to complete an application that includes information on the applicant's current place of residence. On her application to rent an apartment, a woman notes that she currently resides in Cambridge House. The manager of the apartment complex knows that Cambridge House is a group home for women receiving treatment for alcoholism. Based solely on that information and his personal belief that alcoholics are likely to cause disturbances and damage property, the manager rejects the applicant. The rejection is unlawful because it is based on a generalized stereotype related to a disability rather than an individualized assessment of any threat to other persons or the property of others based on reliable, objective evidence about the applicant's recent past conduct. The housing provider may not treat this applicant differently than other applicants based on his subjective perceptions of the potential problems posed by her alcoholism by requiring additional documents, imposing different lease terms, or requiring a higher security deposit. However, the manager could have checked this applicant's references to the same extent and in the same manner as he would have checked any other applicant's references. If such a reference check revealed objective evidence showing that this applicant had posed a direct threat to persons or property in the recent past and the direct threat had not been eliminated, the manager could then have rejected the applicant based on direct threat.

**Example 2:** James X, a tenant at the Shady Oaks apartment complex, is arrested for threatening his neighbor while brandishing a baseball bat. The Shady Oaks' lease agreement contains a term prohibiting tenants from threatening violence against other residents. Shady Oaks' rental manager investigates the incident and learns that James X threatened the other resident with physical violence and had to be physically restrained by other neighbors to keep him from acting on his threat. Following Shady Oaks' standard practice of strictly enforcing its "no threats" policy, the Shady Oaks rental manager issues James X a 30-day notice to quit, which is the first step in the eviction process. James X's attorney contacts Shady Oaks' rental manager and explains that James X has a psychiatric disability that causes him to be physically violent when he stops taking his prescribed medication. Suggesting that his client will not pose a direct threat to others if proper safeguards are taken, the attorney requests that the rental manager grant James X an exception to the "no threats" policy as a reasonable accommodation based on James X's disability. The Shady Oaks rental manager need only grant the reasonable accommodation if James X's attorney can provide satisfactory assurance that James X will receive appropriate counseling and



periodic medication monitoring so that he will no longer pose a direct threat during his tenancy. After consulting with James X, the attorney responds that James X is unwilling to receive counseling or submit to any type of periodic monitoring to ensure that he takes his prescribed medication. The rental manager may go forward with the eviction proceeding, since James X continues to pose a direct threat to the health or safety of other residents.

## **6. What is a "reasonable accommodation" for purposes of the Act?**

A “reasonable accommodation” is a change, exception, or adjustment to a rule, policy, practice, or service that may be necessary for a person with a disability to have an equal opportunity to use and enjoy a dwelling, including public and common use spaces. Since rules, policies, practices, and services may have a different effect on persons with disabilities than on other persons, treating persons with disabilities exactly the same as others will sometimes deny them an equal opportunity to use and enjoy a dwelling. The Act makes it unlawful to refuse to make reasonable accommodations to rules, policies, practices, or services when such accommodations may be necessary to afford persons with disabilities an equal opportunity to use and enjoy a dwelling.

To show that a requested accommodation may be necessary, there must be an identifiable relationship, or nexus, between the requested accommodation and the individual’s disability.

**Example 1:** A housing provider has a policy of providing unassigned parking spaces to residents. A resident with a mobility impairment, who is substantially limited in her ability to walk, requests an assigned accessible parking space close to the entrance to her unit as a reasonable accommodation. There are available parking spaces near the entrance to her unit that are accessible, but those spaces are available to all residents on a first come, first served basis. The provider must make an exception to its policy of not providing assigned parking spaces to accommodate this resident.

**Example 2:** A housing provider has a policy of requiring tenants to come to the rental office in person to pay their rent. A tenant has a mental disability that makes her afraid to leave her unit. Because of her disability, she requests that she be permitted to have a friend mail her rent payment to the rental office as a reasonable accommodation. The provider must make an exception to its payment policy to accommodate this tenant.

**Example 3:** A housing provider has a "no pets" policy. A tenant who is deaf requests that the provider allow him to keep a dog in his unit as a reasonable accommodation. The tenant explains that the dog is an assistance animal that will alert him to several sounds, including knocks at the door, sounding of the smoke detector, the telephone ringing, and cars coming into the driveway. The housing



provider must make an exception to its “no pets” policy to accommodate this tenant.

**7. Are there any instances when a provider can deny a request for a reasonable accommodation without violating the Act?**

Yes. A housing provider can deny a request for a reasonable accommodation if the request was not made by or on behalf of a person with a disability or if there is no disability-related need for the accommodation. In addition, a request for a reasonable accommodation may be denied if providing the accommodation is not reasonable – *i.e.*, if it would impose an undue financial and administrative burden on the housing provider or it would fundamentally alter the nature of the provider's operations. The determination of undue financial and administrative burden must be made on a case-by-case basis involving various factors, such as the cost of the requested accommodation, the financial resources of the provider, the benefits that the accommodation would provide to the requester, and the availability of alternative accommodations that would effectively meet the requester's disability-related needs.

When a housing provider refuses a requested accommodation because it is not reasonable, the provider should discuss with the requester whether there is an alternative accommodation that would effectively address the requester's disability-related needs without a fundamental alteration to the provider's operations and without imposing an undue financial and administrative burden. If an alternative accommodation would effectively meet the requester's disability-related needs and is reasonable, the provider must grant it. An interactive process in which the housing provider and the requester discuss the requester's disability-related need for the requested accommodation and possible alternative accommodations is helpful to all concerned because it often results in an effective accommodation for the requester that does not pose an undue financial and administrative burden for the provider.

**Example:** As a result of a disability, a tenant is physically unable to open the dumpster placed in the parking lot by his housing provider for trash collection. The tenant requests that the housing provider send a maintenance staff person to his apartment on a daily basis to collect his trash and take it to the dumpster. Because the housing development is a small operation with limited financial resources and the maintenance staff are on site only twice per week, it may be an undue financial and administrative burden for the housing provider to grant the requested daily trash pick-up service. Accordingly, the requested accommodation may not be reasonable. If the housing provider denies the requested accommodation as unreasonable, the housing provider should discuss with the tenant whether reasonable accommodations could be provided to meet the tenant's disability-related needs – for instance, placing an open trash collection can in a location that is readily accessible to the tenant so the tenant can dispose of his own trash and the provider's maintenance staff can then transfer the trash to the dumpster when they are on site. Such an accommodation would not involve a



fundamental alteration of the provider's operations and would involve little financial and administrative burden for the provider while accommodating the tenant's disability-related needs.

There may be instances where a provider believes that, while the accommodation requested by an individual is reasonable, there is an alternative accommodation that would be equally effective in meeting the individual's disability-related needs. In such a circumstance, the provider should discuss with the individual if she is willing to accept the alternative accommodation. However, providers should be aware that persons with disabilities typically have the most accurate knowledge about the functional limitations posed by their disability, and an individual is not obligated to accept an alternative accommodation suggested by the provider if she believes it will not meet her needs and her preferred accommodation is reasonable.

## **8. What is a “fundamental alteration”?**

A "fundamental alteration" is a modification that alters the essential nature of a provider's operations.

**Example:** A tenant has a severe mobility impairment that substantially limits his ability to walk. He asks his housing provider to transport him to the grocery store and assist him with his grocery shopping as a reasonable accommodation to his disability. The provider does not provide any transportation or shopping services for its tenants, so granting this request would require a fundamental alteration in the nature of the provider's operations. The request can be denied, but the provider should discuss with the requester whether there is any alternative accommodation that would effectively meet the requester's disability-related needs without fundamentally altering the nature of its operations, such as reducing the tenant's need to walk long distances by altering its parking policy to allow a volunteer from a local community service organization to park her car close to the tenant's unit so she can transport the tenant to the grocery store and assist him with his shopping.

## **9. What happens if providing a requested accommodation involves some costs on the part of the housing provider?**

Courts have ruled that the Act may require a housing provider to grant a reasonable accommodation that involves costs, so long as the reasonable accommodation does not pose an undue financial and administrative burden and the requested accommodation does not constitute a fundamental alteration of the provider's operations. The financial resources of the provider, the cost of the reasonable accommodation, the benefits to the requester of the requested accommodation, and the availability of other, less expensive alternative accommodations that would effectively meet the applicant or resident's disability-related needs must be considered in determining whether a requested accommodation poses an undue financial and administrative



burden.

**10. What happens if no agreement can be reached through the interactive process?**

A failure to reach an agreement on an accommodation request is in effect a decision by the provider not to grant the requested accommodation. If the individual who was denied an accommodation files a Fair Housing Act complaint to challenge that decision, then the agency or court receiving the complaint will review the evidence in light of applicable law and decide if the housing provider violated that law. For more information about the complaint process, see question 19 below.

**11. May a housing provider charge an extra fee or require an additional deposit from applicants or residents with disabilities as a condition of granting a reasonable accommodation?**

No. Housing providers may not require persons with disabilities to pay extra fees or deposits as a condition of receiving a reasonable accommodation.

**Example 1:** A man who is substantially limited in his ability to walk uses a motorized scooter for mobility purposes. He applies to live in an assisted living facility that has a policy prohibiting the use of motorized vehicles in buildings and elsewhere on the premises. It would be a reasonable accommodation for the facility to make an exception to this policy to permit the man to use his motorized scooter on the premises for mobility purposes. Since allowing the man to use his scooter in the buildings and elsewhere on the premises is a reasonable accommodation, the facility may not condition his use of the scooter on payment of a fee or deposit or on a requirement that he obtain liability insurance relating to the use of the scooter. However, since the Fair Housing Act does not protect any person with a disability who poses a direct threat to the person or property of others, the man must operate his motorized scooter in a responsible manner that does not pose a significant risk to the safety of other persons and does not cause damage to other persons' property. If the individual's use of the scooter causes damage to his unit or the common areas, the housing provider may charge him for the cost of repairing the damage (or deduct it from the standard security deposit imposed on all tenants), if it is the provider's practice to assess tenants for any damage they cause to the premises.

**Example 2:** Because of his disability, an applicant with a hearing impairment needs to keep an assistance animal in his unit as a reasonable accommodation. The housing provider may not require the applicant to pay a fee or a security deposit as a condition of allowing the applicant to keep the assistance animal. However, if a tenant's assistance animal causes damage to the applicant's unit or the common areas of the dwelling, the housing provider may charge the tenant for



the cost of repairing the damage (or deduct it from the standard security deposit imposed on all tenants), if it is the provider's practice to assess tenants for any damage they cause to the premises.

## **12. When and how should an individual request an accommodation?**

Under the Act, a resident or an applicant for housing makes a reasonable accommodation request whenever she makes clear to the housing provider that she is requesting an exception, change, or adjustment to a rule, policy, practice, or service because of her disability. She should explain what type of accommodation she is requesting and, if the need for the accommodation is not readily apparent or not known to the provider, explain the relationship between the requested accommodation and her disability.

An applicant or resident is not entitled to receive a reasonable accommodation unless she requests one. However, the Fair Housing Act does not require that a request be made in a particular manner or at a particular time. A person with a disability need not personally make the reasonable accommodation request; the request can be made by a family member or someone else who is acting on her behalf. An individual making a reasonable accommodation request does not need to mention the Act or use the words "reasonable accommodation." However, the requester must make the request in a manner that a reasonable person would understand to be a request for an exception, change, or adjustment to a rule, policy, practice, or service because of a disability.

Although a reasonable accommodation request can be made orally or in writing, it is usually helpful for both the resident and the housing provider if the request is made in writing. This will help prevent misunderstandings regarding what is being requested, or whether the request was made. To facilitate the processing and consideration of the request, residents or prospective residents may wish to check with a housing provider in advance to determine if the provider has a preference regarding the manner in which the request is made. However, housing providers must give appropriate consideration to reasonable accommodation requests even if the requester makes the request orally or does not use the provider's preferred forms or procedures for making such requests.

**Example:** A tenant in a large apartment building makes an oral request that she be assigned a mailbox in a location that she can easily access because of a physical disability that limits her ability to reach and bend. The provider would prefer that the tenant make the accommodation request on a pre-printed form, but the tenant fails to complete the form. The provider must consider the reasonable accommodation request even though the tenant would not use the provider's designated form.

## **13. Must a housing provider adopt formal procedures for processing requests for a reasonable accommodation?**



No. The Act does not require that a housing provider adopt any formal procedures for reasonable accommodation requests. However, having formal procedures may aid individuals with disabilities in making requests for reasonable accommodations and may aid housing providers in assessing those requests so that there are no misunderstandings as to the nature of the request, and, in the event of later disputes, provide records to show that the requests received proper consideration.

A provider may not refuse a request, however, because the individual making the request did not follow any formal procedures that the provider has adopted. If a provider adopts formal procedures for processing reasonable accommodation requests, the provider should ensure that the procedures, including any forms used, do not seek information that is not necessary to evaluate if a reasonable accommodation may be needed to afford a person with a disability equal opportunity to use and enjoy a dwelling. See Questions 16 - 18, which discuss the disability-related information that a provider may and may not request for the purposes of evaluating a reasonable accommodation request.

**14. Is a housing provider obligated to provide a reasonable accommodation to a resident or applicant if an accommodation has not been requested?**

No. A housing provider is only obligated to provide a reasonable accommodation to a resident or applicant if a request for the accommodation has been made. A provider has notice that a reasonable accommodation request has been made if a person, her family member, or someone acting on her behalf requests a change, exception, or adjustment to a rule, policy, practice, or service because of a disability, even if the words “reasonable accommodation” are not used as part of the request.

**15. What if a housing provider fails to act promptly on a reasonable accommodation request?**

A provider has an obligation to provide prompt responses to reasonable accommodation requests. An undue delay in responding to a reasonable accommodation request may be deemed to be a failure to provide a reasonable accommodation.

**16. What inquiries, if any, may a housing provider make of current or potential residents regarding the existence of a disability when they have not asked for an accommodation?**

Under the Fair Housing Act, it is usually unlawful for a housing provider to (1) ask if an applicant for a dwelling has a disability or if a person intending to reside in a dwelling or anyone associated with an applicant or resident has a disability, or (2) ask about the nature or severity of such persons' disabilities. Housing providers may, however, make the following inquiries, provided these inquiries are made of all applicants, including those with and without disabilities:



- An inquiry into an applicant's ability to meet the requirements of tenancy;
- An inquiry to determine if an applicant is a current illegal abuser or addict of a controlled substance;
- An inquiry to determine if an applicant qualifies for a dwelling legally available only to persons with a disability or to persons with a particular type of disability; and
- An inquiry to determine if an applicant qualifies for housing that is legally available on a priority basis to persons with disabilities or to persons with a particular disability.

**Example 1:** A housing provider offers accessible units to persons with disabilities needing the features of these units on a priority basis. The provider may ask applicants if they have a disability and if, in light of their disability, they will benefit from the features of the units. However, the provider may not ask applicants if they have other types of physical or mental impairments. If the applicant's disability and the need for the accessible features are not readily apparent, the provider may request reliable information/documentation of the disability-related need for an accessible unit.

**Example 2:** A housing provider operates housing that is legally limited to persons with chronic mental illness. The provider may ask applicants for information needed to determine if they have a mental disability that would qualify them for the housing. However, in this circumstance, the provider may not ask applicants if they have other types of physical or mental impairments. If it is not readily apparent that an applicant has a chronic mental disability, the provider may request reliable information/documentation of the mental disability needed to qualify for the housing.

In some instances, a provider may also request certain information about an applicant's or a resident's disability if the applicant or resident requests a reasonable accommodation. See Questions 17 and 18 below.

**17. What kinds of information, if any, may a housing provider request from a person with an obvious or known disability who is requesting a reasonable accommodation?**

A provider is entitled to obtain information that is necessary to evaluate if a requested reasonable accommodation may be necessary because of a disability. If a person's disability is obvious, or otherwise known to the provider, and if the need for the requested accommodation is also readily apparent or known, then the provider may not request any additional information



about the requester's disability or the disability-related need for the accommodation.

If the requester's disability is known or readily apparent to the provider, but the need for the accommodation is not readily apparent or known, the provider may request only information that is necessary to evaluate the disability-related need for the accommodation.

**Example 1:** An applicant with an obvious mobility impairment who regularly uses a walker to move around asks her housing provider to assign her a parking space near the entrance to the building instead of a space located in another part of the parking lot. Since the physical disability (*i.e.*, difficulty walking) and the disability-related need for the requested accommodation are both readily apparent, the provider may not require the applicant to provide any additional information about her disability or the need for the requested accommodation.

**Example 2:** A rental applicant who uses a wheelchair advises a housing provider that he wishes to keep an assistance dog in his unit even though the provider has a "no pets" policy. The applicant's disability is readily apparent but the need for an assistance animal is not obvious to the provider. The housing provider may ask the applicant to provide information about the disability-related need for the dog.

**Example 3:** An applicant with an obvious vision impairment requests that the leasing agent provide assistance to her in filling out the rental application form as a reasonable accommodation because of her disability. The housing provider may not require the applicant to document the existence of her vision impairment.

**18. If a disability is not obvious, what kinds of information may a housing provider request from the person with a disability in support of a requested accommodation?**

A housing provider may not ordinarily inquire as to the nature and severity of an individual's disability (*see* Answer 16, above). However, in response to a request for a reasonable accommodation, a housing provider may request reliable disability-related information that (1) is necessary to verify that the person meets the Act's definition of disability (*i.e.*, has a physical or mental impairment that substantially limits one or more major life activities), (2) describes the needed accommodation, and (3) shows the relationship between the person's disability and the need for the requested accommodation. Depending on the individual's circumstances, information verifying that the person meets the Act's definition of disability can usually be provided by the individual himself or herself (*e.g.*, proof that an individual under 65 years of age receives Supplemental Security Income or Social Security Disability Insurance benefits<sup>10</sup> or a credible statement by the individual). A doctor or other

<sup>10</sup> Persons who meet the definition of disability for purposes of receiving Supplemental Security Income ("SSI") or Social Security Disability Insurance ("SSDI") benefits in most cases meet the definition of disability under the Fair Housing Act, although the converse may not be true. *See e.g., Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 797 (1999)



medical professional, a peer support group, a non-medical service agency, or a reliable third party who is in a position to know about the individual's disability may also provide verification of a disability. In most cases, an individual's medical records or detailed information about the nature of a person's disability is not necessary for this inquiry.

Once a housing provider has established that a person meets the Act's definition of disability, the provider's request for documentation should seek only the information that is necessary to evaluate if the reasonable accommodation is needed because of a disability. Such information must be kept confidential and must not be shared with other persons unless they need the information to make or assess a decision to grant or deny a reasonable accommodation request or unless disclosure is required by law (e.g., a court-issued subpoena requiring disclosure).

**19. If a person believes she has been unlawfully denied a reasonable accommodation, what should that person do if she wishes to challenge that denial under the Act?**

When a person with a disability believes that she has been subjected to a discriminatory housing practice, including a provider's wrongful denial of a request for reasonable accommodation, she may file a complaint with HUD within one year after the alleged denial or may file a lawsuit in federal district court within two years of the alleged denial. If a complaint is filed with HUD, HUD will investigate the complaint at no cost to the person with a disability.

There are several ways that a person may file a complaint with HUD:

- By placing a toll-free call to 1-800-669-9777 or TTY 1-800-927-9275;
- By completing the "on-line" complaint form available on the HUD internet site: <http://www.hud.gov>; or
- By mailing a completed complaint form or letter to:

Office of Fair Housing and Equal Opportunity  
Department of Housing & Urban Development  
451 Seventh Street, S.W., Room 5204  
Washington, DC 20410-2000

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(noting that SSDI provides benefits to a person with a disability so severe that she is unable to do her previous work and cannot engage in any other kind of substantial gainful work whereas a person pursuing an action for disability discrimination under the Americans with Disabilities Act may state a claim that "with a reasonable accommodation" she could perform the essential functions of the job).



Upon request, HUD will provide printed materials in alternate formats (large print, audio tapes, or Braille) and provide complainants with assistance in reading and completing forms.

The Civil Rights Division of the Justice Department brings lawsuits in federal courts across the country to end discriminatory practices and to seek monetary and other relief for individuals whose rights under the Fair Housing Act have been violated. The Civil Rights Division initiates lawsuits when it has reason to believe that a person or entity is involved in a "pattern or practice" of discrimination or when there has been a denial of rights to a group of persons that raises an issue of general public importance. The Division also participates as *amicus curiae* in federal court cases that raise important legal questions involving the application and/or interpretation of the Act. To alert the Justice Department to matters involving a pattern or practice of discrimination, matters involving the denial of rights to groups of persons, or lawsuits raising issues that may be appropriate for *amicus* participation, contact:

U.S. Department of Justice  
Civil Rights Division  
Housing and Civil Enforcement Section – G St.  
950 Pennsylvania Avenue, N.W.  
Washington, DC 20530

For more information on the types of housing discrimination cases handled by the Civil Rights Division, please refer to the Housing and Civil Enforcement Section's website at <http://www.usdoj.gov/crt/housing/hcehome.html>.

A HUD or Department of Justice decision not to proceed with a Fair Housing Act matter does not foreclose private plaintiffs from pursuing a private lawsuit. However, litigation can be an expensive, time-consuming, and uncertain process for all parties. HUD and the Department of Justice encourage parties to Fair Housing Act disputes to explore all reasonable alternatives to litigation, including alternative dispute resolution procedures, such as mediation. HUD attempts to conciliate all Fair Housing Act complaints. In addition, it is the Department of Justice's policy to offer prospective defendants the opportunity to engage in pre-suit settlement negotiations, except in the most unusual circumstances.