

INDIAN RIVER COUNTY, FLORIDA
M E M O R A N D U M

TO: Jason E. Brown; County Administrator

THROUGH: Stan Boling, AICP; Community Development Director *MS*

FROM: John W. McCoy, AICP; Chief, Current Development *IWM*

DATE: June 27, 2017

SUBJECT: Appeal by Hal & Martha McAdams of a Decision by the Planning & Zoning Commission to Deny a Side Yard Setback Variance of 5' Feet for a Pool Enclosure on Lot 3, Block 1, Diana Park Subdivision [VAR-17-05-01 / 92080125-78723]

It is requested that the data herein presented be given formal consideration by the Board of County Commissioners at its regular meeting of July 11, 2017.

BACKGROUND, DESCRIPTION, & CONDITIONS

Hal and Martha McAdam submitted a request for a 5' side yard setback variance to construct a pool enclosure around an existing pool and deck (see attachment #3). The subject site is located on the east side of 61st Avenue just north of 4th Street at 540 61st Avenue (see attachment #2) and is zoned RS-3 (Residential Single-Family up to 3 units/acre).

At its meeting of May 25, 2017, the Planning & Zoning Commission (PZC) denied the variance request on a 4 to 2 vote. The variance was denied based on not meeting all eight criteria required in Chapter 902 of the code as being necessary for a variance approval (see analysis in attachment # 3). The McAdams are now appealing the PZC's denial of the variance request.

The subject residential lot is located within the Diana Park subdivision which was platted and developed in 1958. When the home on Lot 3 was constructed in 1984, the subject subdivision was zoned R-1 (Single-Family District) which had setbacks of 20' on the front, 15' on the rear, and 10' on the sides. The applicant indicates at the time the home was proposed in 1984, the owner chose to justify the home to the north side of the subject lot with a 10' side yard setback line in order to preserve large oak trees which exist on the southern portion of the lot. Later in 1985, the subject lot and subdivision as well as several other areas in the county were rezoned from R-1 to RS-3 which has greater setbacks (25' front and rear, 15' sides). Although the 1985 rezoning action increased setbacks on numerous lots, staff believes that the total number of non-conformities created by that action is limited. Under current zoning regulations, the subject residence is a legal non-conformity with a non-conforming 10' side yard setback on its north side.

When the pool and deck for the subject residence were constructed in 1992, the subject site including the surrounding parcels had been zoned RS-3 (Residential Single-Family up to 3 units/acre) for seven years. The pool was proposed by the owner to meet the RS-3 district minimum 15' setback to the pool. No pool enclosure was proposed at that time. The deck was allowed to be constructed to within 5' of the side property line as allowed by County code, and was constructed approximately 10' from

the side property line; essentially in line with the side of the grandfathered-in home. Thus, the existing deck and pool are consistent with current land development regulations which provides a reduced setback for pool decks.

Now, many years after construction of the pool and deck the owner wishes to cover the entire deck footprint with a screen enclosure. The enclosure, however, is required to meet the 15' side yard setback. The applicant has indicated that locating the pool enclosure 15' from the side (north) property line, the location of the pool edge proposed by the owner and approved in 1992, would put the screen wall of the enclosure at or over the edge of the pool and join the house at the edge of a window. In order to provide for a pool enclosure that would simply "fit over" the existing pool and deck, the applicant has sought a 5' setback variance to locate the pool enclosure 10' from the side (north) property line.

For many years, setback variances such as the subject request were heard by the Board of Adjustment (BOA) which was a separate body appointed by the Board of County Commissioners (BCC) with the sole responsibility of hearing zoning variance requests. Because zoning variance requests were rare, and were rarely granted due to the stringent variance review criteria common throughout the state and specified in the County LDRs (land development regulations), the BOA became largely inactive. In 2015, the BCC with the support of staff and no objection from the last BOA chairman, dissolved the BOA and assigned the PZC the responsibility of hearing variance requests. This subject request was the first variance application filed since 2015 and was the first variance request heard by the PZC. Consequently, the PZC had jurisdiction to act on the request and the applicant exercised their right to appeal the PZC's decision to the BCC.

The BCC is now to consider the appeal and is to approve, approve with conditions, or deny the appeal.

ANALYSIS

LDR Section 902.07 provides guidelines for the Board's review of an appeal. Under Section 902.07(4), the Board is to review the PZC decision and make findings in the following three area.

- (a) *Did the reviewing official fail to follow the appropriate review procedures? If so, what procedural error was made?*
- (b) *Did the reviewing official fail to properly interpret or apply the applicable zoning district regulations? If so, what error in interpretation or application of zoning district regulations was made?*
- (c) *Did the reviewing official fail to properly evaluate the application or request with respect to the comprehensive plan and land development regulations of Indian River County? If so, what error was made in evaluating the application or request with respect to the comprehensive plan policy or land development regulations?*

The Board is to consider each of these criteria and make findings in all three areas addressed by the criteria. Staff's analysis of the PZC's decision in regard to the three criteria as follows:

- (a) *Did the reviewing official fail to follow the appropriate review procedures? If so, what procedural error was made?*

Please see attachment #1 for the applicant's response to the appeal criteria. Both the applicant and staff agree that the PZC followed the proper review procedures in making its decision. Staff properly noticed and processed the variance request which was properly considered by the PZC.

- (b) *Did the reviewing official fail to properly interpret or apply the applicable zoning district regulations? If so, what error in interpretation or application of zoning district regulations was made?*

The appellant and staff agree that the applicable zoning district criteria were properly applied by the PZC. The RS-3 zoning district criteria and side yard setback were properly applied to the proposed enclosure. The 904 criteria related to non-conformities which precludes additions that would expand the degree of non-conformity was also properly applied by the PZC. Lastly, section 902.09(6) regarding the eight required variance criteria was properly applied by the PZC.

- (c) *Did the reviewing official fail to properly evaluate the application or request with respect to the comprehensive plan and land development regulations of Indian River County? If so, what error was made in evaluating the application or request with respect to the comprehensive plan policy or land development regulations?*

The appellant and staff agree that the PZC properly evaluated the request with respect to the comprehensive plan and LDRs, including the LDR sections cited above.

While the appellant agrees that the PZC met all three appeal criteria, the appellant wants to present their "side of the argument" to the Board.

Staff's conclusion is that the Planning & Zoning Commission met all three of the appeal review criteria. Therefore, it is staff's opinion that the Board should uphold the action of the Planning and Zoning Commission and deny the appeal of the PZC's decision to deny the requested variance.

ALTERNATIVES

While the PZC denied the variance, PZC members had considerable discussion and expressed several concerns associated with the variance request. The most substantive concern was the County's role in changing the zoning of the subject site in 1985. That action changed the side setback of the subject lot from 10' to 15' and rendered the subject residence a legal non-conformity with a 10' side yard setback on its north side. Some PZC members felt that the county's 1985 rezoning action led to the owners' situation.

In voting to deny the variance request, a PZC member indicated they were reluctantly voting to deny the variance request since all eight of the variance criteria were not met, but that following the LDR did not necessarily produce a desirable or logical result. During the discussion, a PZC member suggested that a focused, narrowly tailored LDR amendment may be appropriate as an alternative to a variance.

As currently written, the LDRs generally prohibit changes to non-conforming structures and uses that increase or expand the degree of the non-conformity. Changes to a non-conforming structure are allowed that reduce the degree of the non-conformity and additions that fully comply with the current LDRs are also allowed. An excerpt of the current code is below.

Section 904.05. Expansion, increase, or change of nonconformities.

- (1) Generally. No nonconformity shall be enlarged, increased, or changed to a different nonconformity, except upon a determination by the director of community development or his designee that the change results in lessening of the degree of the nonconformity.*
- (2) Additions to nonconforming structures. Additions to nonconforming structures containing conforming uses shall be permitted, if the additions to the structure(s) comply fully with setback and other applicable site-related regulations.*

The general prohibition on expanding a non-conformity is logical, is a foundational principle of non-conformities regulations, and should remain. There is, however, an existing reasonable exception to that general rule. Under the current code, in circumstances where government action in the form of right-of-way acquisition creates a non-conformity, that non-conformity is allowed subject to a staff-approved “cure plan” that mitigates but does not fully resolve the non-conformity created by the government acquisition. A narrowly focused exception to the general provision section of the code could also be crafted that allows limited expansions to non-conforming structures resulting from a County initiated zoning action. Such a narrowly-tailored exception to the general prohibition could read as follows:

For a legally established non-conforming single family home that became non-conforming due to a County initiated rezoning action occurring after January 1, 1980, a setback non-conformity may be extended for an attached accessory structure such as a screen enclosure provided such extension does not exceed the degree of setback non-conformity of the single-family residence.

The Board can direct staff to prepare such an LDR revision. Adoption of such an exception could provide relief to the applicant and any single-family lot owners similarly affected by a county-initiated rezoning action. In staff’s opinion, the number of single-family setback non-conformities created by county-initiated rezoning action is limited (probably less than 50).

RECOMMENDATION

Based on the analysis, staff recommends that the Board of County Commissioners make a finding that the Planning & Zoning Commission adequately evaluated the variance application under the appropriate variance criteria and uphold the Planning & Zoning Commission’s decision to deny the requested variance.

ATTACHMENTS

1. Appeal Letters
2. Location Map
3. PZC Staff Report with Attachments
4. May 25, 2017 Approved PZC Meeting Minutes