



City Council Staff Report

Meeting Date: January 21, 2020

TO: Marco Island City Council

FROM: Daniel J. Smith, AICP

DATE: January 7, 2020

RE: Variance Petition VP 19-001040

PROJECT DESCRIPTION:

Mr. Michael Hajjar, agent for the owner, Raymond A. Jean, as trustee or his successor in trust of the Raymond A. Jean Revocable Living Trust dated June 16, 1975, and as amended February 21, 2003, has submitted a variance petition to allow a cantilevered pool deck and screen enclosure to encroach four feet for a length of 85-89 feet into a thirty-foot deep landscape buffer along the rear of the property. The thirty (30) foot deep landscape buffer was required as part of the original approval of the Hideaway PUD approved in 1979 and runs along the rear of 36 Hideaway lots adjacent to the existing residential lots on Kendall Dr., Colonial Ave, and Spinnaker Dr., which lots are in a different subdivision.

The applicant has provided an application that includes the responses to the criteria for review of a variance, site plan, landscape plan and modeled renderings of what the deck will look like. All are attached to this Staff report.

Staff has included a copy of that portion of the Hideaway PUD indicating the required thirty (30) foot landscape buffer.

PLANNING BOARD SUMMARY AND RECOMMENDATION:

The Planning Board held a public hearing and considered the variance petition at their January 3, 2020 meeting. Discussion included the distinction between an easement and setback; the distinction between the Hideaway PUD document and the Hideaway Architectural Guidelines; and the intent of the landscape buffer being for the benefit of both properties (in Hideaway and along Colonial). Mr. Jean, owner of the lot, presented the variance and reasoning for the request. Mr. Hajjar made a power point presentation outlining the variance request. More discussion ensued surrounding hedging to reduce noise and landscaping to reduce the visual impact of a 26-foot-high screen enclosure. A question was posed if a single-story screen enclosure could be constructed. Two adjacent neighbors spoke against the variance citing the two-story screen enclosure. It was suggested the encroachment be limited to the area of the pool and not the entire length proposed. After discussion, the Planning Board voted 7-0 to recommend approval of a variance with the below finding and conditions:

Finding:

1. The variance will be consistent with Comprehensive Plan.

Conditions:

1. Reduce screen enclosure to a single story.
2. Reduce the length of overhang (encroachment into buffer) by 20 feet.
3. Agree to place a minimum of a six (6) foot high, opaque landscape screen along the rear property line in addition to the proposed landscape plan submitted with the application.

OWNER/APPLICANT:

Raymond A. Jean, as trustee or his successor in trust of the
Raymond A. Jean Revocable Living Trust dated June 16, 1975,
and as amended February 21, 2003
940 Cape Marco Dr., #2401
Marco Island, FL 34145

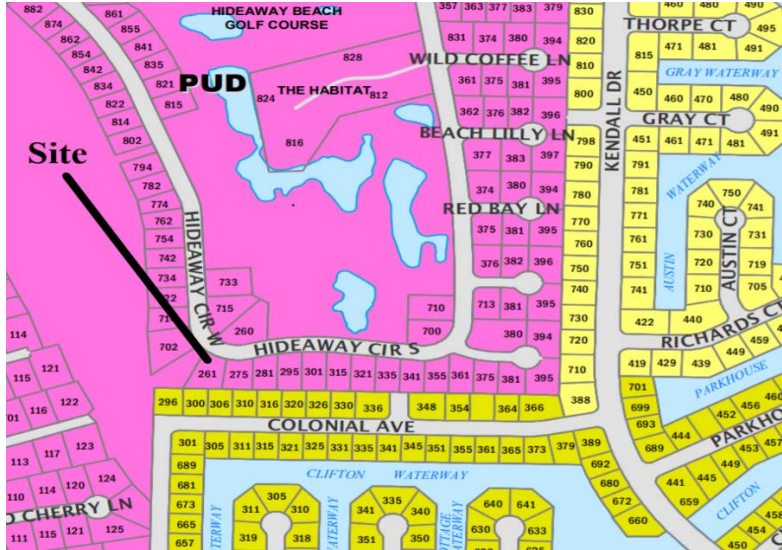
AGENT:

Michael Hajjar (Herscoe Hajjar Architects, LLC)
22 10th St. South
Naples, FL 34102

PROJECT ADDRESS:

Street Address:	261 Hideaway Circle South Marco Island, FL 33950
Legal Description:	Hideaway Beach, Block 17, Lot 1, Hideaway Beach, according to the plat thereof as recorded in Plat Book 12, Pages 80-85, Public Records of Collier County, Florida
Zoning:	Hideaway PUD

SUBJECT PARCEL ZONING MAP:



SUBJECT PARCEL AERIAL:



STAFF ANALYSIS

Staff has reviewed and considered the requested variance and have the below comments.

The applicant indicated that encroachments into yard setbacks are written into our Code, and that is true for items such as staircases (four feet), mechanical equipment (four feet), roof overhands (three feet) and chimneys/fireplace and bay windows (two feet). Most of these items are integral to the habitable structure and is reflected by the amount of allowed encroachment. By allowing the proposed encroachment, which is approximately 85-89 feet long by 4 feet wide, gives the applicant an additional 331+/- square feet of pool decking.

This request is to encroach into a landscape buffer, not a yard setback, which was required in the original approval of the Hideaway PUD for the benefit of both the owner of the lot and the residents abutting the Hideaway PUD. Buffers are different from yard setbacks in that they buffer the uses from each other (see definition below). Our Land Development Code (which mirrored Collier County) states in Sec. 30-384. – Development planning. (a)”The PUD shall provide protection of the development from potentially adverse surrounding influences and protection of surrounding area from potentially adverse influences generated by or thing the PUD. Such protetion shall include, but is not limited to, adequate buffering and screening as follows: fences, walls, or vegetative screening at the boundaries of the PUD districts shall be provided in accordance with the landscaping/buffereing requirements of the land development code, to protect residents from undersirable views, lighting, noise or other adverse off-site influences, or to protect residents of adjaoining districts from similar possible influences from with- in the PUD district.”

Our Code definition of landscape buffer is set forth in Section 30-10(c) as follows:

Landscape buffer means an area of land which is required to be set aside along the perimeter of a lot in which landscaping (existing, relocated or introduced) is used to provide a transition between, and to reduce the undesirable or incompatible impacts between differing land uses.

The standards for granting a variance are set forth in Section 30-65(g)(3) of the Land Development Code (“LDC”), as follows:

(3) *Standards for approval of a variance.* Before any variance shall be recommended for approval to the city council, the planning board shall consider and be guided by the following standards in making a determination:

a. That there are special conditions and circumstances existing which are peculiar to the location, size and characteristics of the land, structure, or building involved;

b. That there are special conditions and circumstances which do not result from the action of the applicant such as pre-existing conditions relative to the property which is the subject of the variance request;

c. That a literal interpretation of the provisions of this LDC works an unnecessary and undue hardship on the applicant or creates a practical difficulty on the applicant;

d. That the variance, if granted, will be the minimum variance that will make possible the reasonable use of the land, building or structure and which promote standards of health, safety or welfare;

e. That granting the variance requested will not confer on the petitioner any special privilege that is denied by this LDC to other lands, buildings, or structures in the same zoning district;

f. That granting the variance will be in harmony with the intent and purpose of this zoning code, and not be injurious to the neighborhood, or otherwise detrimental to the public welfare;

- g. That there are natural conditions or physically induced conditions that ameliorate the goals and objectives of the regulation such as natural preserves, lakes, golf course, or similar circumstances; and
- h. That the granting of the variance will be consistent with the comprehensive plan.

While variance approvals don't usually set a precedent, because each application must stand on its own, staffs take into account, among other items, how this could set precedent, and whether that is a good precedent to set. This relates to whether there are special conditions peculiar to the lot, which is the first requirement for a variance set forth in Section 30-65(g)(3)a. of the LDC. In considering this request to encroach into the landscape buffer we ask the question: If approved, how large will the next encroachment requested be, or the next application after that? At what point does the intention of the landscape buffer become ineffective? Staff is concerned allowing this encroachment without meeting the criteria set out in Code just opens the door for other, larger encroachments.

To date, we have received one email from an adjacent neighbor objecting to the encroachment into the thirty-foot landscape buffer and is attached to the Staff report.

For your convenience, the following pages contain the applicant's response to the criteria for review and consideration of a variance.

Applicant's response:

For variance requests for *existing structure(s)*, please provide the following information:

1. What is the requested encroachment?

4 ft. Cantilever deck.

2. When property owner purchased property

Property purchased (lot) by Raymond A. Jean Revocable Trust – 7/2/18

3. When was the existing structure built (include building permit number if possible)?

New construction, permit is being filed simultaneously herewith

4. How existing encroachment created?

New construction, permit is being filed simultaneously herewith. No encroachments pre-existing.

5. What is the certified cost estimate for bringing the existing structure(s) into compliance?

New construction, no existing structures.

6. What extenuating circumstances exist related to the existing structures encroachment?

New construction, no pre-existing structures.

7. Are there any life/safety concerns related to the existing structure(s)?

New construction, no pre-existing structures

For variance requests for *proposed structure(s)*, please provide the following information:

1. What is the proposed encroachment?

Cantilever balcony 4 ft. into 30' Landscape Buffer Easement

2. Why is the encroachment is necessary?

To provide functional deck space around the pool by extending the pool deck out 4 additional feet. The pool screen will be extended out to the outer edge of the balcony deck.

Applicant's response to criteria:

4. Will the variance, if granted, be the minimum variance that will make possible the reasonable use of the land, building or structure and which promote standards of health, safety or welfare?

No

5. Will granting the variance requested confer on the petitioner any special privilege that is denied by these zoning regulations to other lands, buildings, or structures in the same zoning district?

No

6. Will granting the variance be in harmony with the intent and purpose of this zoning code, and not be injurious to the neighborhood, or otherwise detrimental to the public welfare?

Yes.

7. Are there natural conditions or physically induced conditions that ameliorate the goals and objectives of the regulation such as natural preserves, lakes, golf course, etc?

No

8. Will granting the variance be consistent with the growth management plan?

Yes, the variance would not adversely impact the existing landscaping or 30 ft. "Buffer" Zone." The Petitioner has requested and received permission for the 4 ft. cantilever balcony from Hideaway ARC (see attached). Additionally, per Hideaway ARC manual, Diagram F (see attached excerpts from Hideaway 1/16/19 ARC Design Criteria Manual in accordance with the Growth Management Plan), indicates that a 4 ft. balcony is permitted. The balcony requested shall be at 6 ft. above grade to permit the existing vegetation and plantings in the 30 ft. "Buffer Zone".

Applicant's response to criteria:

3. What extenuating circumstances exist related to the proposed structure encroachment?

The FEMA elevation places the first floor of the house roughly 6.5-7.5 ft. above natural grade preventing a natural transition to grade from the house roughly 6.5-7.5 ft. above natural grade.

NATURE OF PETITION

Please note that staff and the Marco Island Planning Board shall be guided in their recommendation to City Council acting as the Board of Zoning Appeals, and that City Council shall be guided in its determination to approve or deny a variance petition by the below listed criteria. Please provide a narrative response to the listed criteria and/or questions. Attach additional pages if necessary.

1. Are there special conditions and circumstances existing which are peculiar to the location, size and characteristics of the land, structure or building involved?

No

2. Are there special conditions and circumstances which do not result from the action of the applicant such as pre-existing conditions relative to the property which is the subject of the variance request?

Hideaway PUD 30' "Buffer" requirement vs. City of Marco Island "Setback". Hideaway has provided letter (attached) giving permission for a 4 ft. balcony over buffer zone thus broadening the PUD's explicit rule allowing up to 4 ft balconies over a set-back area. ***

3. Will a literal interpretation of the provisions of this zoning code work unnecessary and undue hardship or create practical difficulties on the applicant?

Yes, the pool size will be reduced in size and the surface area for exterior seating and sunbathing will be limited. Access around the pool along the rear side of the pool will be eliminated.

*** (2) continued: Note that Marco LDC Section 30-1004 allows a number of encroachments into side setbacks. Most houses on Marco have a side setback of 7.5' and there is a 6' drainage and utility easement along that side, leaving 1 ½' outside the easement and adjacent to the building envelope. Yet, there are 10 exceptions in this code section, i.e.: A/C, fireplaces, bay windows, can encroach up to 2 feet (1/2 of a foot into the easement), stairways, balconies 4 feet (2 ½ feet into the easement), etc. These exceptions allow going into the easement at grade. There is no legal difference in encroaching into this buffer easement, which in the PUD is for the sole benefit of HBA members and nothing says how high the plants will be in that easement.

In addition to the applicant's response, Staff has provided responses to the criteria based upon analysis of the information provided, our codes, Comprehensive Plan and the Hideaway PUD.

- (1) That there are special conditions and circumstances existing which are peculiar to the location, size and characteristics of the land, structure, or building involved.

Staff Comments: There are no special conditions or circumstances that exist on this property or the proposed building, pool and deck. The structures in question have not been built. The lot on which the encroachment is proposed is substantially similar to the

other lots upon which the landscape buffer is located. Granting this variance would essentially be re-writing the PUD requirements.

- (2) That there are there special conditions and circumstances which do not result from the action of the applicant such as pre-existing conditions relative to the property which is the subject of the variance request.

Staff Comments: There are no special pre-existing conditions or circumstances on the site. The need for the variance is based on the design of the home and results from the applicant's action. Essentially, the need for the variance is self-created. In 1957, the Florida Supreme Court in Josephson v. Autrey, 96 So.2d 784 (Fla. 1957), ruled that self-created hardships do not form a basis for demonstrating an unnecessary hardship.

- (3) That a literal interpretation of the provisions of this zoning code work unnecessary and undue hardship on the applicant or create practical difficulties on the applicant.

Staff Comments: The need for the variance to encroach into the landscape buffer is not based on an unnecessary or undue hardship or a practical difficulties on the applicant. The structure, pool and deck have not been built and can be accommodated within the building setbacks. Further, an "unnecessary and undue hardship" has generally been defined as a non-self created characteristic of the property in question which renders it virtually impossible to use the land for the purpose or in the manner for which it is zoned." Miami-Dade County v. Brennan, 802 So.2d 1154, 1155 (Fla. 2d DCA 2001)(Fletcher, J., concurring). Florida case law indicates that the undue and unnecessary hardship standard is a very tough standard. A hardship may not be found unless *no* reasonable use can be made of the property. Thompson v. Planning Commission of City of Jacksonville, 464 So.2d 1231 (Fla. 1st DCA 1985) (1985). Stated another way, the hardship must be such that it renders it virtually impossible to use the land for the purpose for which it is zoned. Hemisphere Equity Realty Co. v. Key Biscayne Taxpayers Association, 369 So.2d 996 (Fla. 3rd DCA 1979).

A "practical difficulty," which is the other standard set in the LDC, is similar to the unnecessary hardship standard. However, it is a standard that is somewhat less rigorous than the 'unnecessary hardship' standard. Bd. of Adjustment v. Kwik-Chek Realty, Inc., 389 A.2d 1289 (Del.Sup. 1978); Busalacchi v. Bd. Of Zoning Adjustment of St. Bernard Parrish, 519 So.2d 167 (La.App. 1987); Wolfman v. Bd. of Appeals, 444 N.E.2d 943 (Mass.App.), *rev. denied*, 447 N.E.2d 670 (Mass. 1983); Martel v. Vancouver Bd. of Adjustment, 666 P.2d 916 (Wash.App. 1983); 83 Am.Jur.2d *Zoning* §904 n.74 (1992). According to one New York court, some of the factors that may be considered in determining whether a practical difficulty exists include: (i) how substantial the variance is in relation to the requirement; (ii) whether a substantial change will be produced in the character of the neighborhood; (iii) whether the difficulty can be obviated by some method feasible for the applicant to pursue other than by a variance; (iv) whether, in view of the manner in which the difficulty arose, the interest of justice will be served by allowing the variance. See, e.g., Friendly Ice Cream Corp. v. Barrett, 483 N.Y.S.2d 782 (App. Div. 1984). An important point is that the "practical difficulty" must affect the lot or parcel of

land in question. Behrens v. Ebenrech, 784 S.W.2d 827 (Mo.App. 1964). The practical difficulty should not affect the applicant. For example, a variance was properly denied when the applicant's only reason for seeking a variance was the practical difficulty of having an "ailing" mother-in-law. DeMarco v. Curcio, 546 N.Y.S.2d 672 (App.Div. 1989). In this case, the difficulty is that the applicant seeks a larger pool deck.

Staff finds that there is neither an unnecessary and undue hardship nor a practical difficulty.

- (4) That the variance, if granted, be the minimum variance that will make possible the reasonable use of the land, building or structure and which promote standards of health, safety or welfare.

Staff Comments: Denial of the variance will not prevent the reasonable use of the land. A single-family home, pool and decking can be built without the variance.

- (5) That granting the variance requested will not confer on the petitioner any special privilege that is denied by this LDC to other lands, buildings, or structures in the same zoning district.

Staff Comments: Granting the variance *will* confer a special privilege by allowing the encroachment into the thirty-foot landscape buffer within the Hideaway PUD development.

- (6) That granting the variance be in harmony with the intent and purpose of this zoning code, and not be injurious to the neighborhood, or otherwise detrimental to the public welfare.

Staff Comments: Granting the variance to encroach into the thirty-foot landscape buffer would not be in harmony with the intent and purpose of the buffer. In addition, the buffer was put into place for the benefit of both the residential PUD lots, and the abutting neighbors along Colonial Dr. As stated earlier, a neighbor on Colonial Dr. has sent an email objecting to the requested variance.

- (7) That there are natural conditions or physically induced conditions that ameliorate the goals and objectives of the regulation such as natural preserves, lakes, golf course, or similar circumstances.

Staff Comments: There are no natural or physical conditions that ameliorate the goals and objections of the regulations.

- (8) That the granting of the variance will not be consistent with the Comprehensive Plan.

Staff Comments: The granting of the variance does not appear to be consistent with the Comprehensive Plan. Policy 1.7.1 of the Future Land Use Element states:

The City will continue to enforce adopted architectural and site design regulations in the adopted Land Development Code (LDC).

PUD's are regulated by the LDC. As such, the PUD site design regulations should be consistent with the Comprehensive plan and enforced accordingly.

PLANNING BOARD ACTION

Staff recommends the Planning Board deny the requested variance based on the following findings:

- (1) There are no special conditions or circumstances that exist on this property or the proposed building, pool and deck. The structures in question have not been built.
- (2) There are no special pre-existing conditions or circumstances on the site.
- (3) Denial of the variance to encroachment into the thirty-foot landscape buffer will not cause unnecessary or undue hardship and will not create practical difficulties on the applicant. The structure, pool and deck have not been built and can be accommodated within the building setbacks.
- (4) Denial of the variance will not prevent the reasonable use of the land. A single-family home, pool and decking can be built without the variance.
- (5) Granting the variance will confer a special privilege by allowing the encroachment into the thirty-foot landscape buffer within the Hideaway development.
- (6) Granting the variance to encroach into the thirty-foot landscape buffer would not be in harmony with the intent and purpose of the buffer. In addition, the buffer was put into place for the benefit of the abutting neighbors along Colonial Dr. As stated earlier, a neighbor on Colonial Dr. has sent an email objecting to the requested variance.
- (7) There are no natural or physical conditions that ameliorate the goals and objections of the regulations.
- (8) The granting of the variance is not consistent with the Comprehensive Plan. PUD's are regulated by the LDC. As such, the PUD site design regulations should be consistent with the Comprehensive plan and enforced accordingly.

The City will continue to enforce adopted architectural and site design regulations in the adopted Land Development Code (LDC).