

Variances to Stormwater Management Regulations



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September 3, 2020



Variances are a Fact of Life

15.64.040 Stormwater management committee--Created.

- A. There is created a metropolitan stormwater management committee which shall consist of seven members.
- B. The membership of the committee shall be as follows:
 - 1. Four members who shall be registered professional engineers in the State of Tennessee with expertise in civil engineering, hydraulics, hydrology, and/or environmental sciences; and
 - 2. Three lay members from the community at large.
- C. The members shall be appointed by the mayor and confirmed by a majority vote of the whole metropolitan council.
- D. The members appointed by the mayor shall have been residents of the metropolitan government area for not less than one year, and shall continue to be so eligible as long as they shall serve.
- E. Appointed members of the committee shall serve a term of four years. The terms of office of the first appointed members shall be staggered, two for a term of two years, two for a term of three years, and two for a term of four years.



Variance Considerations

- a. Variances shall only be issued upon a determination that the variance is the minimum necessary, considering the flood hazard, to afford relief; and in the instance of a historical building, a determination that the variance is the minimum necessary so as not to destroy the historic character and design of the building.
- b. Variances shall only be issued upon (i) a showing of good and sufficient cause, (ii) a determination that failure to grant the variance would result in exceptional hardship, and (iii) a determination that the granting of a variance will not result in increased flood heights, additional threats to public safety or extraordinary public expense; create nuisance; cause fraud on or victimization of the public; or conflict with existing local laws or ordinances.



Variance Considerations (Not)

- ▶ Economic hardship – costs too much to meet the regulations
- ▶ Can't build what I want if variance not granted
- ▶ Elevating the home will look funny on the street
- ▶ Property is not unique (in the floodplain)
- ▶ If request denied it is a legal “Taking” and Metro needs to buy my property



Variance Types

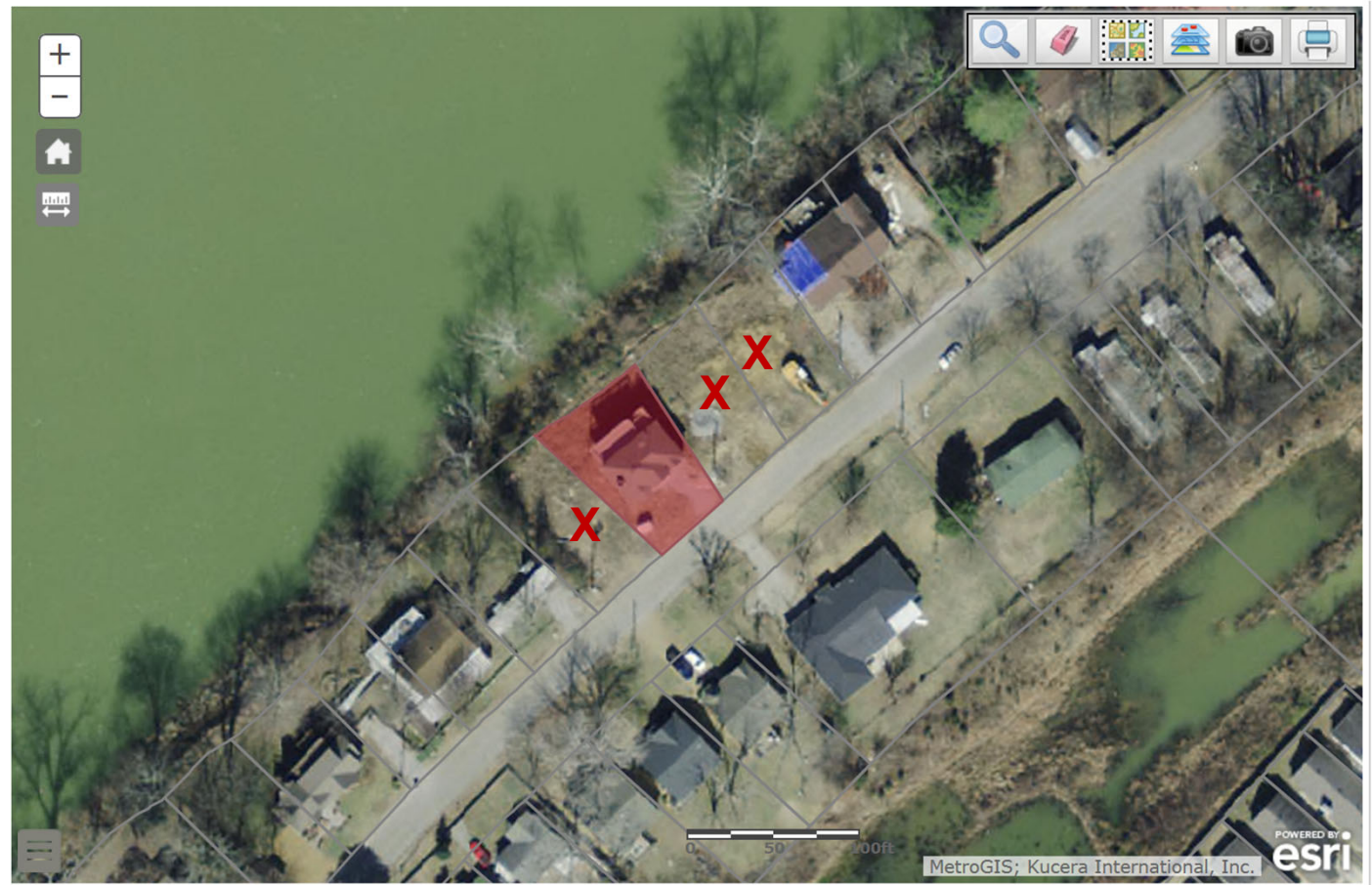
- ▶ Disturbance of Zone 1 buffer
- ▶ Disturbance within the floodway
- ▶ Un-compensated fill in the floodplain
- ▶ Reduction of min FFE (4' freeboard)
- ▶ Stream crossing not at 90 degrees
- ▶ Water Quality provisions
- ▶ Continuous mowing of the buffer area



Variance Case Study

April 2010–
Nearly
completed
home on the
river

Three
adjacent
vacant lots



Variance Case Study

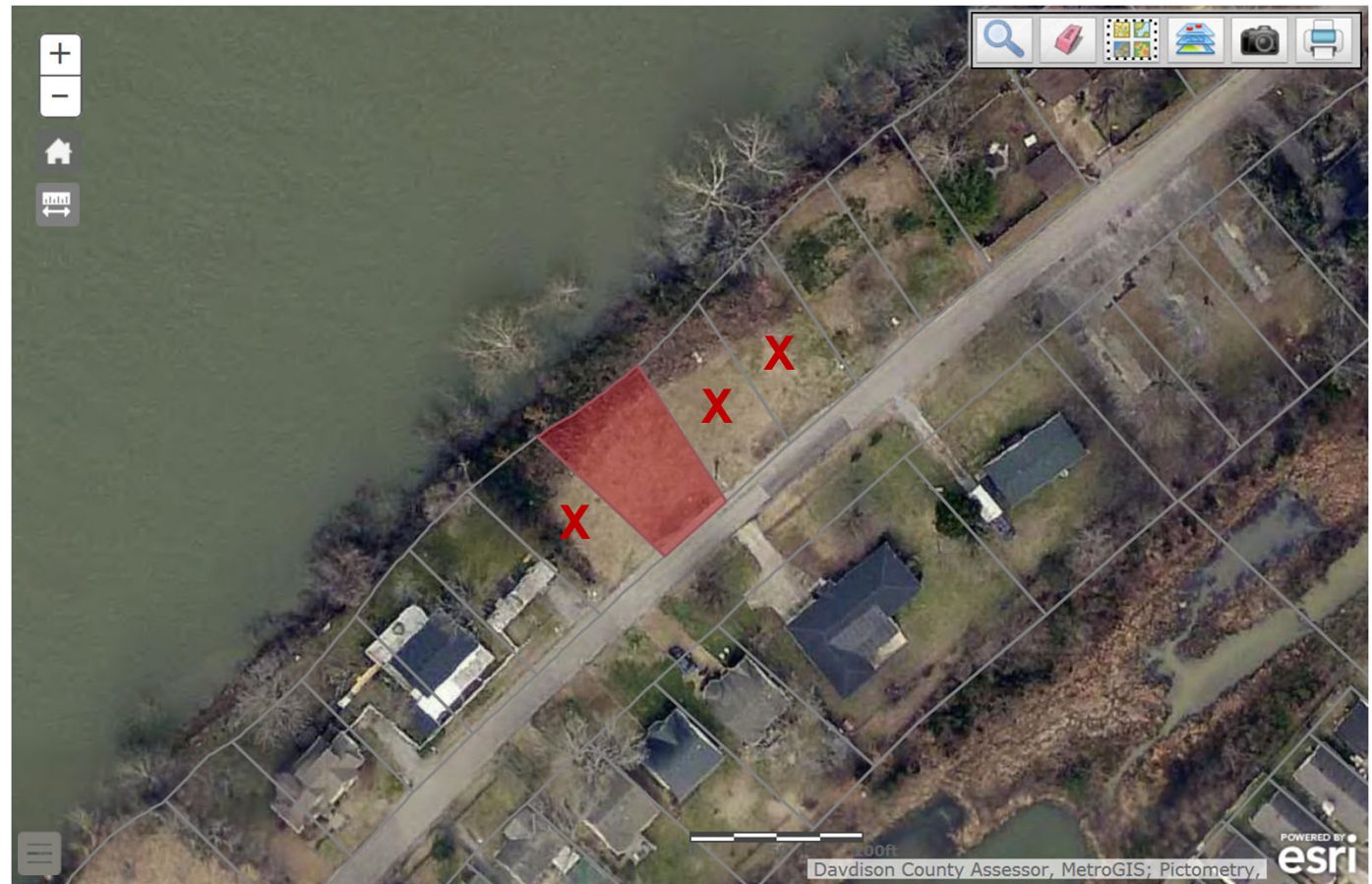
May 2010
Flood



Variance Case Study

Home
purchased
and
demolished
through
HMGP Grant

Vacant lots
not part of
HMGP Grant

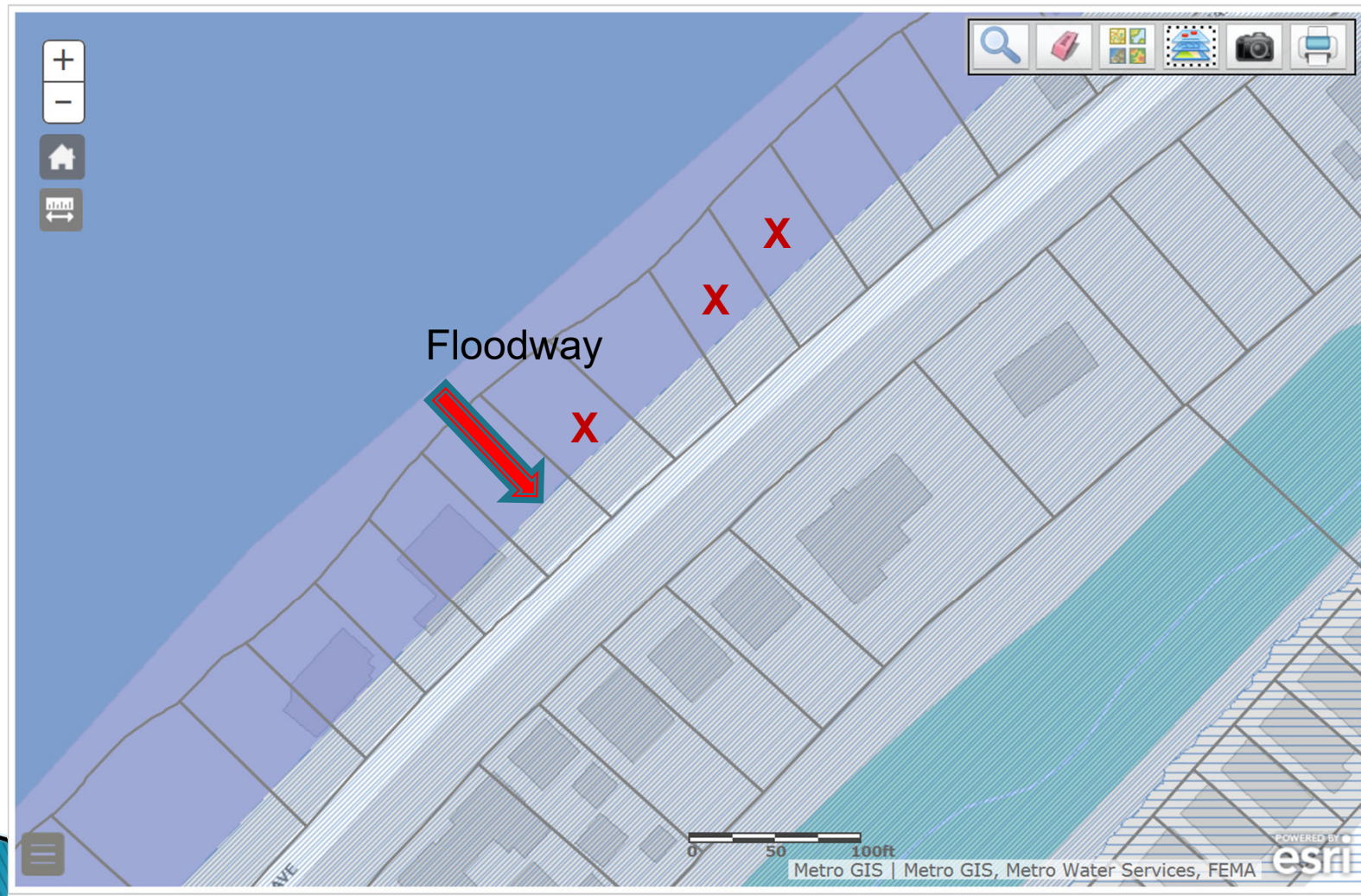


Local Mitigation Project

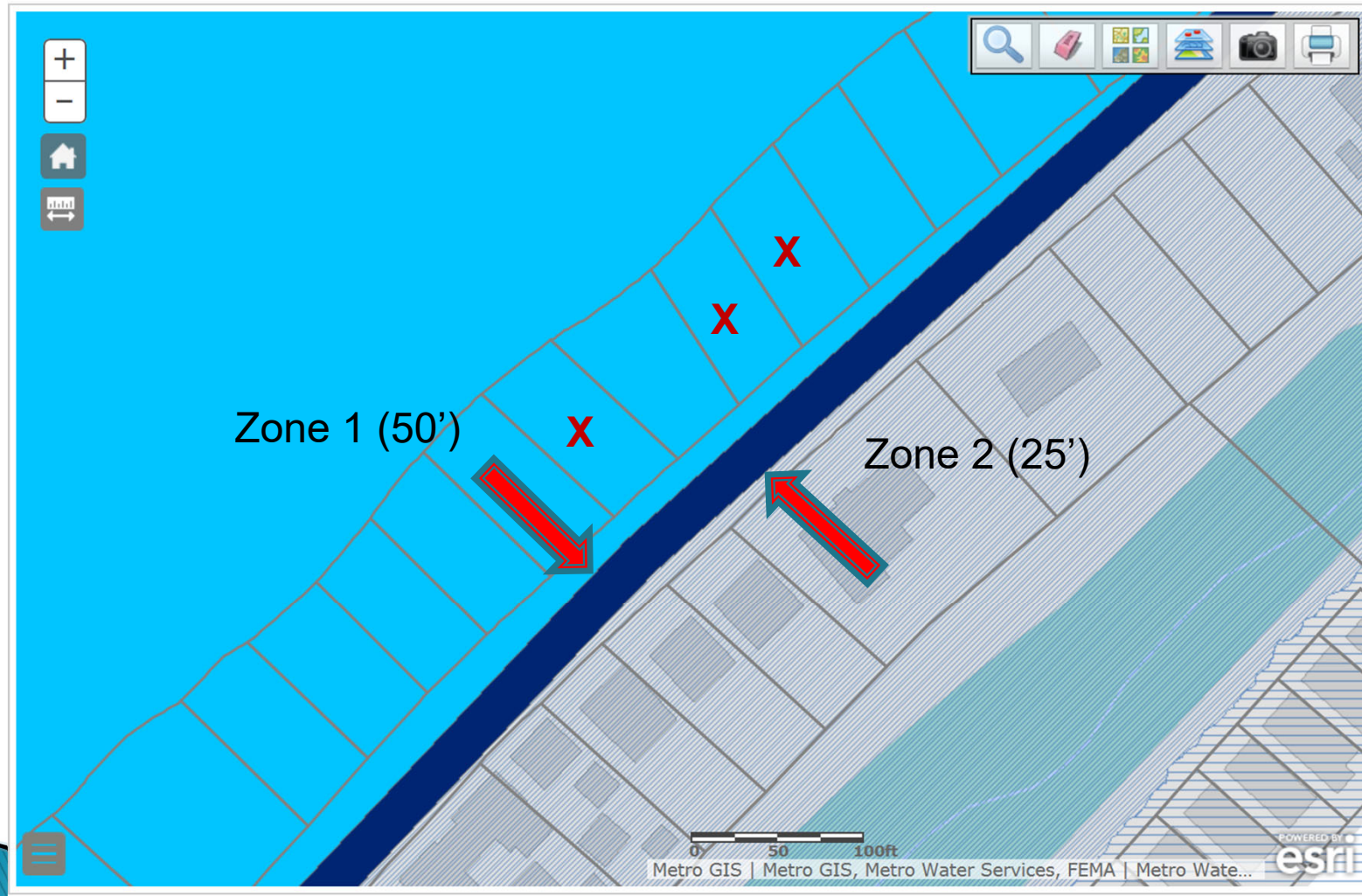
- ▶ Mayor appropriated \$5M for flood mitigation
- ▶ Purchased at-risk homes that would not qualify for FEMA mitigation projects
- ▶ Purchased homes that were on previous projects – homeowners now ready to sell
- ▶ Made offers to purchase vacant lots on the river including 3 lots in previous slide
- ▶ Appraised values were lowered to \$1500 after May 2010 flood
- ▶ Property owner not interested in selling



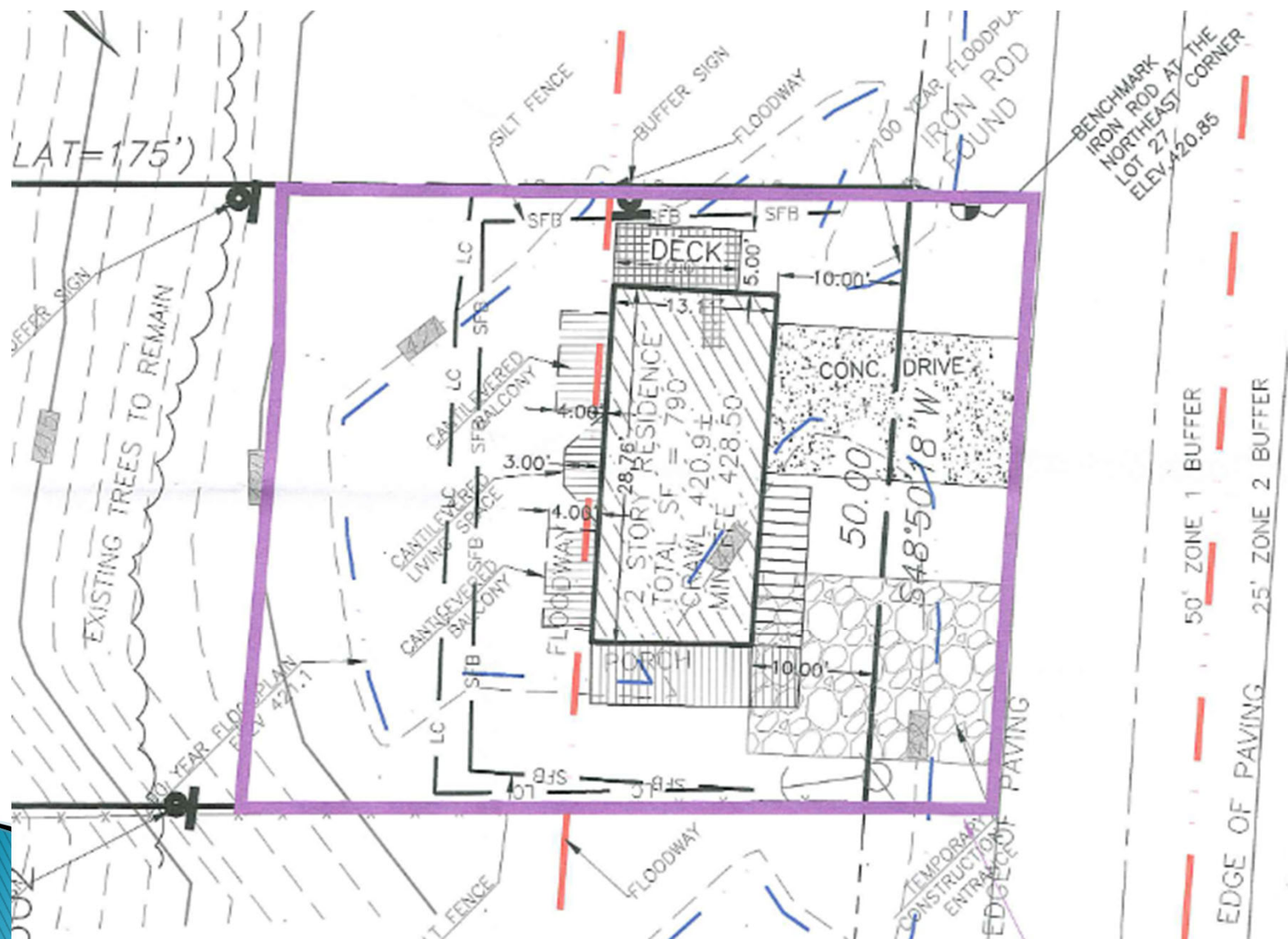
Floodway / Floodplain



Floodway Buffer (75' total)

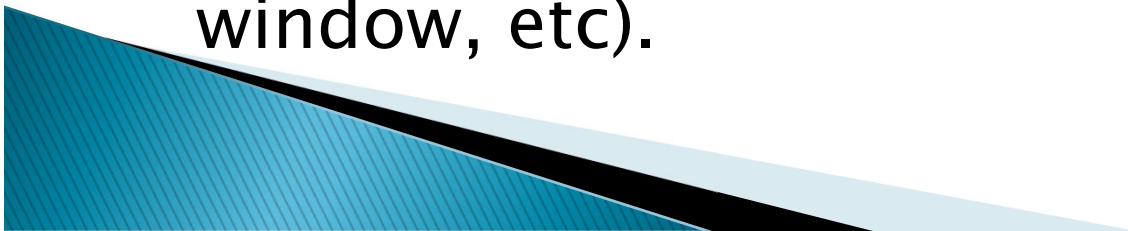


Building Permit Request



Variance Request

- ▶ Received a variance from Board of Zoning Appeals for a 10' reduction in front setback
- ▶ Discussion during the pre-application meeting determined that the project will consist of 3 separate single family homes with side and rear decks that will cantilever over the floodway (no posts) and be elevated 6' above the BFE. Further discussion revealed that the areas off the rear will not be decks but additional living space (floor area/bay window, etc).



Variance Request

- 1) Disturbance of the 50' Zone 1 of the 75' floodway buffer of the Cumberland River for construction of a single family residence, including a porch, steps, and deck on the ends of the house.
- 2) Disturbance of the floodway of the Cumberland River to construct cantilevered portions of the house over the floodway maintaining minimum low chord of the structure approximately 6' above the 100-year flood elevation (BFE=421.1'). The cantilevered portions will include 2 balconies and 1 living space area.
- 3) Modified buffer signage (with alternate wording as approved) and placement as shown on the record plan (each property line at existing tree line).
- 4) Continuous mowing of the buffer to the edge of the existing tree line as shown on the record plan.



Committee Hearing #1

- ▶ 6-1 Vote to **Defer** to allow Metro the opportunity to purchase the parcels
- ▶ For tax purposes value set at \$1500 after the May 2010 flood (previously \$70,000)
- ▶ Parcels appraised value at \$10,000 each
- ▶ Property owner believed value of each lot to be \$150,000+
- ▶ MWS was not able to purchase the parcels



Committee Hearing #2

- ▶ 2-4 Vote to **Approve** – floodway and buffers created a hardship
- ▶ Lots are un-buildable without a variance
- ▶ After the motion to Approve failed there was no other motions to Deny or Defer
- ▶ The case was over ?



Committee Hearing #3

- ▶ Applicant submitted a request for a rehearing based on belief that the committee's decision was based on **incomplete and inaccurate information**
- ▶ Motion to **Deny** rehearing failed – committee member concerned about adding 3 more homes to add to the burden of first responders
- ▶ 4–2 vote to **Approve** rehearing



Committee Hearing #4

- ▶ “New information” was presented to the committee – much discussion
- ▶ 3–3 vote to **Approve** variance – must have a majority vote – motion failed
- ▶ No other motions were made to either Deny or Defer the variance
- ▶ Motion **Failed** (not approved)
- ▶ The case was over !
- ▶ Or was it?



Appeal to Chancery Court

- ▶ Applicant claimed that the committee's action was “arbitrary and capricious”
- ▶ Cited decisions on similar cases
- ▶ Filed a “writ of certiorari” (to be made certain)
- ▶ Court conducted a full review of the documents in the case record
- ▶ Court **Affirmed** the decision of the committee
- ▶ Based on substantial and material evidence and was not arbitrary and capricious.
- ▶ Case was over?



Court of Appeals of TN

- ▶ Decision of the committee created an “exceptional hardship”

Does the fact that no construction can occur on these lots without a variance constitute exceptional hardship and/or good and sufficient cause? Under the standards discussed above, we conclude that there is nothing unusual or exceptional about ~~xxxxxxx~~ property; rather, the lots are located in Zone 1, where construction is not permitted, and ~~xxxxxxx~~ did not submit evidence sufficient to overcome the “extreme hardship” threshold necessary to justify a variance from the requirements of the Zone 1 restrictions.



Court Ruling

- ▶ Committee members individually acted “illegally, arbitrarily, or fraudulently”
- ▶ All testimony of each committee member that voted “No” was fully analyzed and considered
- ▶ Concerns regarding first responders and public expense is justified
- ▶ “We conclude that the Committee’s decision is supported by material evidence and affirm the decision of the trial court”
- ▶ Case Closed !



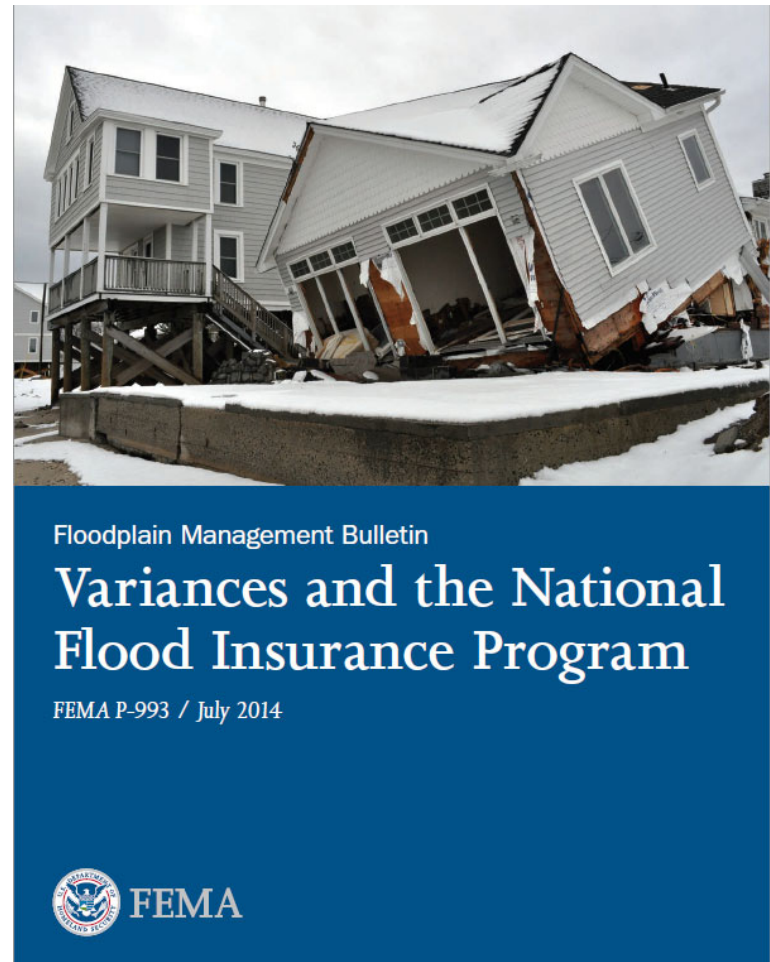
Summary

- ▶ Communities must have a well established Variance process
- ▶ Committee members must be well-trained and serious about their task
- ▶ Must keep accurate documentation both written and audio
- ▶ Important to have legal representation at committee meetings
- ▶ Everything you say can and will be used...



Resources

- ▶ 44 CFR 60.6
Variances and
exceptions
- ▶ Floodplain
Management
Bulletin
FEMA P-993



Questions?

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