RESOLUTION NO. 2018-33
RICE CREEK WATERSHED DISTRICT
BOARD of MANAGERS

CONCERNING REQUEST FOR VARIANCE
PERMIT No. 16-027, MAX SEGLER

Manager Bradley offered the following resolution and moved its adoption, seconded by Manager Waller:

BACKGROUND

1. On May 11, 2016, the Rice Creek Watershed District (RCWD) Board of Managers ("Board") approved Permit No. 16-027 with conditions, for issuance to Max Segler ("Permittee"). The work encompassed construction of a single-family residence with a driveway crossing over a wetland and associated floodplain.

2. To preserve flood storage capacity, RCWD Rule E.3(b) requires that for any fill placed in floodplain, an equal amount of replacement flood storage volume be created during the term of the permit. Among other conditions, Permit No. 16-027 required creation of flood storage replacement volume equal to the amount of fill in floodplain that the applicant's engineer estimated the wetland crossing would require. In addition, the permit required Permittee to submit an as-built survey of floodplain fill impact and replacement volume to confirm compliance. Permittee proposed to fill 26 +/- cubic yards (CY) of floodplain for the crossing, and his submitted plans designated the location where replacement volume would be created. The approved plans were incorporated into the permit.

3. Permittee completed construction of the residence and of an 18-foot wide surface driveway with 3:1 side slope. According to the District engineer's review of the as-built survey, the project placed a total of 24 CY of fill within the floodplain.

4. All work under the permit has been completed, except for the required creation of replacement flood storage volume. The permit term has elapsed. On May 9, 2018, Permittee appeared before the Board and his concern regarding the permit condition was discussed at length. On August 23, 2018, Permittee submitted a request for an after-the-fact variance, asking to be relieved of the responsibility to fulfill the outstanding permit condition. The Board has considered this request at its regular meetings of September 26, 2018, and October 10, 2018.

5. The Board has reviewed the request in accordance with District Rule L: Variances. Under this rule, to grant a variance, the Board must find:

- Special conditions apply to the structure or land that do not apply generally to other land or structures in the District.

- Because of the property's unique conditions, undue hardship or practical difficulty to the applicant would result if the strict letter of the rule were applied. Economic
considerations alone do not constitute undue hardship if reasonable use of the property exists.

- The proposed activity will not adversely affect public health, safety or welfare; create extraordinary public expense; or adversely affect water quality, water control or drainage; and

- The intent of the rule is met.

6. The Board has applied the “practical difficulty” standard rather than the “undue hardship” standard, in that the former is not as strict for the applicant to meet. Under Rule L, the Board determines whether “practical difficulty” has been shown by considering the following criteria:

- Criterion (a): How substantially the request varies from the rule requirement.

- Criterion (b): The effect of the variance on government services.

- Criterion (c): Whether the variance would substantially change the character of watershed resources or be a substantial detriment to neighboring properties.

- Criterion (d): Whether the practical difficulty can be alleviated by a technically and economically feasible method other than a variance.

- Criterion (e): How the practical difficulty occurred and whether the landowner created the need for the variance.

- Criterion (f): Whether the variance will serve the interests of justice.

7. In his variance request, Permittee states that creation of replacement flood storage volume would require the removal of valuable forest edge habitat that also serves as natural wetland buffer. He cites as well the expense associated with tree removal, excavation and site restoration. His request includes a letter from his consultant, Wayne Jacobson of Jacobson Environmental, PLLC, which notes that during 2016, in which total precipitation reached a 25-year high, the driveway structure caused no flooding. It includes as well a July 30, 2018, letter from Kathleen Castle, City Planner, stating that the City prefers maintaining forested buffer vegetation, though it does not object to the RCWD’s requirement. An April 11, 2018 letter from Tom Wesolowski, City Engineer, confirms that the location identified for volume replacement in Permittee’s plans and incorporated into the permit is acceptable to the City.

8. In a September 19, 2018 memorandum, the District engineer evaluates the technical basis for the variance request pursuant to the above criteria. The engineer recommends that the variance be denied due to the absence of practical difficulty, for reasons including the following:
a. Per criterion (c), while the one-time loss of 24 CY of floodplain volume likely will not have a significant impact on the 100-year floodplain elevation, multiple occurrences of floodplain storage volume loss could result in an impact to the 100-year elevation. Also, the absence of flooding under high annual precipitation levels is not indicative, as the purpose of preserving flood storage is for individual high-intensity precipitation events or concentrated intervals of high-intensity precipitation.

b. Also per criterion (c), the applicant has not quantified the number of trees that would need to be removed, has not provided their sizes, and has not sought to assess the buffer function that would be lost to create the required replacement flood storage. Historically, the RCWD has not considered tree removal to be a practical difficulty, in that trees regularly are removed in constructing projects.

c. Per criterion (d), the flood storage replacement location is as identified and proposed by Permittee in his submitted plans, indicating that the Permittee did not consider meeting the permit condition in this location to be infeasible.

d. Per criterion (f), the need to remove trees to comply with the permit condition, and the cost of doing so, are not site-specific conditions.

9. On September 24, 2018, Permittee telephoned District engineer Greg Bowles and related the following additional reasons and arguments for the after-the-fact variance:

a. During driveway construction, subsurface utilities such as gas, electric and sewer were placed through the area designated for flood storage replacement, thus making it impossible to meet the condition at the location specified in the plans without relocating the utilities.

b. Alternative areas to excavate for flood storage replacement, referenced as areas B1 and B2, were evaluated but are not feasible because they would require tree removal as well, both to create the flood storage volume and further to allow equipment ingress to and egress from the location.

c. Loss of trees would result in less water taken up by tree roots.

d. Neighbors and the City prefer the trees to remain as buffer.

10. The Board considered these additional matters at its September 26, 2018 meeting. At the conclusion of the meeting, Permittee was advised that the Board would act on the request at its October 10, 2018 meeting. RCWD staff advised Permittee that he would bear the burden to support the variance request, including information about the following:

a. The depth and alignment of the utilities and, in light of that, whether some or all of the flood volume replacement in the permit-designated area can be achieved.
b. Whether the utilities could have been located differently so as to not interfere with replacement in the permit-designated area.

c. Whether some amount of volume replacement can feasibly be provided higher on the site, with a hydraulic connection to the basin.

d. From the city, what potential buildout remains within the relevant shoreland area.

e. From the city, documentation of any landmark trees on the parcel and how the city code regulates removal of a landmark tree.

Permittee was advised that technical information would be most authoritative if prepared by Permittee’s technical representative.

11. Thereafter, Permittee submitted further support for the arguments he has advanced above. The District engineer has reviewed this added material in an October 4, 2018 addendum to its memorandum. Permittee’s submittals are attached to that memorandum. In his submittals, Permittee includes a drawing prepared by his technical consultant that identifies a location where an estimated 12.7 cubic yards of flood storage replacement can be achieved. Permittee notes that the area proposed for flood storage contains 18 trees of 16-inch diameter, and five trees of 24-inch diameter. The District engineer advises that on the basis of the elevation the District uses to determine compensatory storage, Permittee may be able to achieve additional volume and potentially the full amount required.

FINDINGS

12. The minutes of the Board’s regular meetings of May 9, 2018; September 26, 2018; and October 10, 2018; and the documents regarding this matter within the official materials of those meetings; are incorporated into the record of this variance consideration.

13. Special conditions apply to Permittee’s structures or lands, by virtue of the relation of the wetland to the buildable portion of the land and the location of crossing access. Special conditions do not include the need to remove trees to create the required flood storage replacement. Trees regularly are removed for site development. The record does not indicate that the trees located within the area designated by Permittee include those specially designated by scientific standards or official controls for preservation. The City defines trees of certain diameter as “landmark” trees, but Permittee does not document whether any such trees lie within the flood storage replacement location. Further, the City engineer advises that if landmark trees must be removed to conform to a District permit, the City does not require tree replacement.

14. Permittee has demonstrated practical difficulty, based on a weighing of the following:

a. Permittee himself proposed the location of flood storage replacement. At that time, necessarily, Permittee considered replacement in that location to be
reasonably achievable. However, difficulty has resulted from the placement of subsurface utilities within the replacement area.

b. Although the proposed instance of fill would not raise the 100-year flood elevation of the wetland basin significantly, the District engineer advised that the cumulative allowance of fill in proportion to that requested by Permittee could result in problematic loss of flood storage within the floodplain of Long Lake. It is RCWD policy to carefully preserve regional flood storage volume within the Lower Rice Creek planning region, where the Permittee’s work is located. The District’s watershed management plan (for example, sections 3.3.5, 5.5, 6.3.2.5 and 8.3.2) identifies water quantity management as an important priority and one that is addressed through the District’s regulatory program.

c. Granting the variance would not affect government services, as it would not serve as a precedent for floodplain fill applications to be determined on a case-by-case basis, instead of by the uniform criterion of Rule E.3(b). A variance in this case would be based on the unique conditions of the parcel configuration in relation to the wetland and the location of the subsurface utilities that, the Board finds, is due in part to excusable circumstances.

d. Permittee has submitted a drawing prepared by his technical consultant that represents that a minimum of 12.7 cubic yards of replacement can be provided.

e. Permittee has not documented that it was impossible to locate the utilities outside of the designated replacement location. By installing the utilities in the asserted location, at a time when Permit No. 16-027 was in effect and designated that location for excavation, Permittee created the need for the variance. However, the Board finds that the circumstances under which the utilities were placed in that location mitigate Permittee’s responsibility for that and allow the Board to conclude that Permittee should not be required to move the utilities in order to utilize the replacement location identified in the permit.

15. At the October 10, 2018 Board meeting, Permittee represented to the Board that he will achieve at least 14 cubic yards of flood volume replacement and that he accepts a variance under the terms set forth below.

THEREFORE BE IT RESOLVED that the August 23, 2018 variance request for relief from Rule E.3(b) under Permit No. 16-027 is granted, with the following conditions:

- Before work begins, Permittee must record on the property a covenant that any fill threshold exemption under the District’s floodplain alteration or equivalent rule will be inapplicable to any further floodplain fill activity on the property.

- Before work begins, Permittee will pay to the District the amount of $712.50 for outstanding variance review fees.

- Permittee will create the greatest amount of flood storage replacement feasible within the area delineated in Attachment A to this resolution. Permittee will supply an as-built
survey and such other documentation that demonstrates the creation of at least 14 cubic yards of flood storage replacement.

- Stipulation 2 of Permit 16-027 is revised to read: “Applicant must provide an as-built survey of the flood plain impact and mitigation area to the District for verification of compliance with the approved plans and the variance approved on November 14, 2018.”

The question was on the adoption of the Resolution and there were 5 yeas and 0 nays as follows:

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Upon vote, the Chair declared the resolution passed.

Michael Bradley, Secretary

Dated: November 14, 2018

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I, Michael Bradley, Secretary of the Rice Creek Watershed District, do hereby certify that I have compared the above resolution with the original thereof as the same appears of record and on file with the District and find the same to be a true and correct transcript thereof.

IN TESTIMONY WHEREOF, I hereunto set my hand this November 14, 2018.

Michael Bradley, Secretary