

**Town of Nags Head
Board of Adjustment**

May 13, 2021

The Board of Adjustment of the Town of Nags Head met in regular session Thursday, May 13, 2021, in the South Wing of Nags Head Fire Station #16 in Nags Head, North Carolina.

Members Present Margaret Suppler, Bobby Gentry, John Mascaro, Angelina Lowe, Judy Burnette

Others Present Kelly Wyatt, Michael Zehner, Ben Gallop, Jay Wheless, Margaux Kerr, Lily Nieberding

Call to Order Chair Margaret Suppler called the meeting to order at 9:00 a.m. as a quorum was present.

Chair Suppler stated that there was one item being brought before the Board this morning:

Variance request submitted by property owners, Edwin and Debra Bollerup, from the requirements of Section 8.6.6.1 of the Unified Development Ordinance as it pertains to lot coverage and the need to construct handicap accessible features on the property. The property for which the variance is being requested is zoned R-2, Medium Density Residential and is located at 8633 E. Tide Drive.

Chair Margaret Suppler provided an overview of the Board of Adjustment. Ms. Suppler then swore in all witnesses.

Evidence presented by Town Deputy Planning Director Kelly Wyatt explained that Edwin and Debra Bollerup, as the applicants and property owners, had submitted a variance request from Section 8.6.6. Lot Coverage of the Unified Development Ordinance (UDO) for the property and primary residence located at 8633 E. Tide Drive.

Ms. Wyatt explained that although lot coverage is calculated based on the lot area, in some cases portions of the lot area are excluded from the calculation. For example, for an oceanfront lot, lot coverage is calculated based on the lot area west of the first line of stable natural vegetation or the static line, whichever is further landward of the ocean.

8.6.6.5.1. of the UDO states that in the case of an oceanfront lot, only that area landward of the first line of stable natural vegetation or the static line (if present), shall be used for calculating lot coverage. In cases where both lines are present, the calculation shall be made using the line that is furthest landward of the ocean.

Ms. Wyatt displayed for the Board a site plan of the Bollerup's lot noting that it is an oceanfront property. Because this property is in an

area that did receive beach nourishment, Ms. Wyatt stated that the focus will be on the static line which crosses in front of the primary structure.

Ms. Wyatt stated that this is the Bollerup's primary residence and in order to provide facilities enhancing the accessibility of the home for the property owner with compromised mobility, they have proposed to construct 177 square feet of coverage east of the static line. These improvements would consist of a portion of a concrete walkway, decking and elevator shaft.

Ms. Wyatt explained that the way the Ordinance is written the subject lot is not entitled to any lot coverage, or in the case of the proposed scope of work, any additional lot coverage seaward of the static line.

The term "static line" is defined by the Division of Environmental Quality (NC DEQ), Coastal Area Management Act (CAMA), Coastal Development Rules. Once a static vegetation line is established, and after the onset of beach nourishment, the line shall be used as the reference point for measuring oceanfront setbacks in all locations where it is landward of the vegetation line.

Ms. Wyatt explained that if the Board were to grant a variance from the zoning regulations, the applicants will then need to apply to the Coastal Resources Commission to receive a variance from the CAMA regulations.

Ms. Wyatt stated that the property owners have addressed each finding of fact in their application, noting that accessibility to the home in its current design comes with many difficult obstacles; that without the variance the homeowner will likely be unable to enter the structure; and that the proposed design has been thoughtfully designed by engineers to address the needs of the homeowners while taking into account the fluctuating grades on the oceanfront as well as the elevation of the home on pilings.

Ms. Wyatt proceeded to review Staff's findings of fact:

Unnecessary hardship would result from the strict application of the UDO. It shall not be necessary to demonstrate that, in the absence of the variance, no reasonable use can be made of the property.

Staff submits that the strict application of Section 8.6.6.1 does create a hardship in this circumstance in that the existing home is not handicap accessible and for continued use and enjoyment of the home by the owner-occupant certain handicap facilities would need to be constructed east of the static vegetation line.

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.

While this property is not necessarily peculiar in terms of its oceanfront location, size or topography, Staff would submit that there is not a significant inventory of homes located almost entirely east of the static vegetation line. Additionally, while it may not be the sole basis for the granting of a variance, the inability to construct handicap accessible features to accommodate safe entry and exit for the homeowner and occupant creates a unique hardship.

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 shall not be regarded as a self-created hardship.

This request is being driven by a need for handicap accessible improvements being made to the home to accommodate the homeowner and occupant. The home's location east of the static vegetation line or the homeowner's circumstance are not a result of actions taken by the property owner.

The requested variance is consistent with the spirit, purpose, and intent of the ordinance, such that public safety is secured, and substantial justice is achieved.

Staff would submit that the requested variance is consistent with the spirit, purpose, and intent of the ordinance, such that public safety is secured, and substantial justice is achieved. While this variance does result in an increase of lot coverage east of the static vegetation line, the coverage is the minimum amount necessary given the needs of the homeowner. The addition of the proposed decking and elevator shaft does not derogate from the spirit, purpose, and intent of the ordinance but rather ensures that public safety is secured, and substantial justice is achieved.

Ms. Wyatt noted that the Town is currently in the process of adopting numerous text amendments to the UDO to ensure consistency with new legislation captured within NCGS Chapter 160D. Specifically, Section 3.10.1.2 is to be amended as follows as required by the updates to the State's statutes:

The hardship results from conditions that are peculiar to the property, such as location, size, or topography... 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.

Staff anticipates that these revisions will be adopted by the Nags Head Board of Commissioners at their June 2nd, 2021, meeting. While this language regarding the granting of a variance to provide reasonable accommodations under the Federal Fair Housing Act for a person with disability is not currently in effect in the Town's code, it will be prior to July 1st, 2021, and this Board may wish to take this information into consideration when considering this request.

Based upon the above analysis, Staff is of the opinion that the strict

enforcement of the Unified Development Ordinance as it pertains to the requested lot coverage east of the static vegetation line does create practical difficulties or unnecessary hardship for the applicant/homeowner and for this particular site. Therefore, Staff recommends that the Board grant the requested variance as presented.

Ms. Wyatt stated that she as well as the applicants, Mr. and Mrs. Bollerup and their engineer Mike O'Steen were present and available to answer any questions for the Board.

Evidence presented by Applicant Debbie Bollerup, applicant and property owner thanked the Board for their consideration of the request. The Board did not have any question for the applicant.

Bob Smith, Nags Head property owner briefly addressed the Board and asked them to consider the request. Mr. Smith noted that he owns a house across the street from the property in question. Mr. Smith stated that the Bollerups are permanent residents, good neighbors and he fully supports their request.

The Board then proceeded to review the findings of fact:

Does strict application of the ordinance result in an unnecessary hardship? The Board agreed unanimously that Yes it does. It is evident that the house is not handicap accessible.

Does the hardship result from conditions that are peculiar to the property? The Board agreed unanimously with Staff's findings that Yes it does.

Does the hardship result from actions taken by the applicant? The Board agreed unanimously with Staff's findings that No, it did not.

Is the requested hardship in keeping with the spirit and intent of the ordinance? The Board agreed unanimously with Staff's findings that Yes it was.

Motion Based on their findings and together with Staff's findings, Judy Burnette moved to grant the variance request. Bobby Gentry seconded the motion and the motion passed unanimously.

Order The Board of Adjustment of the Town of Nags Head (the "Board") held a public hearing on May 13, 2021, to consider a variance application submitted by property owners, Edwin and Debra Bollerup (the "Owners") seeking to vary the requirements of Section 8.6.6.1, Lot Coverage, of the Unified Development Ordinance (the "UDO") as it pertains to their property located at 8633 E. Tide Drive, Nags Head. The Board, having heard all of the evidence and arguments presented at the hearing, makes the following **FINDINGS OF FACT:**

1. The Owners own the Property.
2. The property is located within the R-2, Medium Density Residential Zoning District.
3. Section 8.6.6.1 of the UDO pertains to lot coverage and establishes that for oceanfront lots, lot coverage is calculated based on the lot area west of the first line of stable natural vegetation or the static line, whichever is further landward.
4. The subject lot is an oceanfront property and is located almost entirely east of the static vegetation line due to its proximity to the ocean.
5. The Owners seek to construct handicap-accessible features on the property, including a concrete walkway, decking, and an elevator shaft, which would add 177 square feet of lot coverage east of the static line.
6. The proposed construction is necessary to provide safe and accessible entry to the home for the property owner, who has compromised mobility.
7. The strict application of Section 8.6.6.1 does not permit any additional lot coverage seaward of the static vegetation line.
8. The Owners' home is their primary residence and is elevated on pilings, which further complicates accessibility without the proposed improvements.
9. The proposed improvements have been designed to address the accessibility needs of the Owners while considering the unique topography of the oceanfront lot.
10. Construction of the proposed handicap-accessible features would require compliance with all other applicable ordinances, including those related to lot coverage, floodplain management, and building codes.
11. If the variance is granted, the Owners will need to apply for a variance from the Coastal Resources Commission (CAMA) for compliance with applicable regulations.
12. Staff has noted that revisions to the UDO are anticipated to align with changes to NCGS Chapter 160D, which include allowing variances to provide reasonable accommodations for persons with disabilities.

Based on the above Findings of Fact, and considering the burdens of proof and persuasion being on the Applicants, the Board makes the following **CONCLUSIONS**:

1. All parties are properly before the Board, and the Board has the

jurisdiction to consider and render a decision on the Requested Variance.

2. Conclusions Regarding Specific Variance Criteria established by Section 3.10.1, Standards for Granting a Variance, of the Unified Development Ordinance:

(a) A strict application of the ordinance **does** result in an unnecessary hardship to the Applicants/Owners.

- The strict application of Section 8.6.6.1 creates a hardship in that the Owners are unable to construct necessary handicap-accessible improvements to their home due to the static line constraints.

(b) The hardship **does** result from conditions that are peculiar to the property, such as location, size, or topography.

- The property's location almost entirely east of the static vegetation line is unique and impacts the ability to construct the necessary improvements.

(c) The hardship **does not** result from actions taken by the Applicants or the property owners. 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.

- The need for the requested variance arises from the accessibility requirements of the Owners and the property's unique location relative to the static vegetation line.

(d) The Requested Variance **is** consistent with the spirit, purpose, and intent of the ordinance, such that public safety is secured, and substantial justice is achieved.

- The requested improvements are minimal in scope, are necessary for accessibility, and do not derogate from the spirit, purpose, and intent of the ordinance.

THEREFORE, based upon all of the foregoing, the application for a variance to permit 177 square feet of additional lot coverage east of the static vegetation line for the purpose of constructing handicap-accessible features is GRANTED with the following conditions:

1. The proposed improvements shall comply with all applicable local, state, and federal ordinances, including any requirements established by the Coastal Resources Commission (CAMA).
2. A copy of the executed decision on this approved variance shall be recorded at the Dare County Register of Deeds.

Minutes

Bobby Gentry moved to approve the minutes of the December 2020 meeting. John Mascaro seconded the motion, and the motion passed unanimously.

John Mascaro then moved to approve the minutes of the April 2021 meeting. Bobby Gentry seconded the motion, and the motion passed unanimously.

Adjourn

There being no further business to discuss, the meeting adjourned at 9:21 AM.

Respectfully Submitted,
Lily Campos Nieberding

