

**Town of Nags Head
Board of Adjustment**

September 9, 2021

The Board of Adjustment of the Town of Nags Head met in regular session Thursday, September 9, 2021, in the Board Room, Nags Head Municipal Complex, 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 were three items being brought before the Board this morning:

Variance Amendment request submitted by property owner Deborah Carrara from the requirements of Section 8.6.3.5.4 of the Unified Development Ordinance, Yard Requirements for Accessory Structures with habitable space. The property for which the variance is being requested is zoned C-2, General Commercial with adherence to the R-3, High Density Residential dimensional standards and is located at 2606 S. Memorial Avenue Nags Head, NC.

Variance request submitted by property owners Steven and Deborah Jones from the requirements of Section 11.44, Provisions for Flood Hazard Reduction, of the Unified Development Ordinance. The property is zoned SPD-C, Village at Nags Head, Single-Family 3 and is located at 100 E. Sandcastle Court, Nags Head, NC.

Variance request submitted by property owner, Michael McVearry from Section 7.78.3, Walls and Fences, of the Unified Development Ordinance. The property is zoned C-2, General Commercial and is located at 6812 S. Virginia Dare Trail, Nags Head, NC.

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 Ms. Deborah Carrara, as the applicant and property owner, had submitted a variance amendment request from the previously granted variance on March 11, 2021. Ms. Carrara is seeking an additional variance from the following section of the Unified Development Ordinance (UDO) for the property located at 2606 S. Memorial Avenue, Nags Head:

8.6.3.5.4. Yard Requirements for Accessory structures with habitable space shall meet the setbacks of the principal structure regardless of location on the lot.

Ms. Wyatt explained that the variance granted on March 11 allowed Ms. Carrara the ability to construct a 10' x 16' accessory structure in the rear yard of her property to be utilized as a detached home office with air conditioning and a restroom (while Ms. Carrara's application materials refer to this as a "studio," this was not interpreted to mean a residential studio or efficiency; likewise, where the materials refer to this as a "dwelling," it is assumed that this is a typo; however, it would be helpful for Ms. Carrara to confirm the same on the record). Upon submittal of an as-built survey it was noted that Ms. Carrara had constructed a structure with dimensions of 10.3 x 16.3 feet and had also constructed a 7 ft. wide deck/landing and 3 ft. wide set of stairs and an outdoor shower enclosure, neither of which were depicted in the original variance application or subsequent permit applications, and both of which are additional encroachments within the required yard/setback.

Ms. Wyatt presented the as-built survey to the Board and explained that these deviations represent an increase beyond the parameters of the originally granted variance, thus requiring consideration of an amended variance request.

It was noted during the previous hearing that this structure would be required to meet the NC Building Code as well as the Flood Damage Prevention Ordinance regulations in terms of being elevated to the regulatory flood protection elevation (RFPE) of 9 ft. msl. With the elevation of the structure came the need for egress stairs that were not accounted for in the original variance request. Ms. Carrara has provided a completed variance application as well as a supplemental narrative as part of her request noting that various aspects of construction of this accessory structure changed due to the Covid-19 Pandemic and the availability of building materials.

Section 3.10, Variances, of the Unified Development Ordinance outlines the criteria necessary in order for an applicant to seek an amendment to a previously granted variance and for the Board of Adjustment to hear a request for such an amendment:

The owner of land which has been granted a variance may apply for an amendment to the previously granted variance. All of the standards for granting a variance shall apply to the consideration of an amendment to an existing variance. An amendment may only be granted if:

The circumstances on the property have substantially changed since the time of the granting of the prior variance in such a way that the use of the property in accordance with prior variance is itself an unnecessary hardship; or

The amendment requested will be equal to or less of a variance than the previously granted variance.

In review of this request the following are areas of concern for staff:

1. The additional decking and stairs, while not included in the original

variance request, was also not included on the development permit application, and the subsequently issued zoning and building permits.

Town Code Section 8.6.3.6.1 states "The inner edge of the front, rear, or side yard shall be measured from the building foundation and may exclude the outermost three feet of eaves, gutters, uncovered handicapped ramps, or uncovered steps".

The Town has historically included open wood-slatted landings as part of the uncovered steps with a landing being the minimum area needed to open the doorway and enter or exit. Staff is of the opinion that had the applicant discussed the need for a landing and stairs prior to construction that the minimum amount of landing and stairs needed could be accommodated with no variances necessary or, if needed, a negligible variance from the required 30-foot rear yard setback.

2. Ms. Carrara provided testimony as part of the original variance request that the bathroom she was proposing would not include a shower. A shower was indicated on the floorplan submitted as part of the development permit application and was subsequently constructed. The testimony provided by Ms. Carrara was part of the basis for the Board granting the original variance.

3. Ms. Carrara has constructed a 4' x 5' outdoor shower with walls. This shower was not included in the original variance request and was also not included on the development permit application and subsequently issued zoning and building permits.

4. Ms. Carrara testified that as an insurance agent working from home due to the Covid-19 Pandemic, she had experienced hardship in having to move her work-related items from shared spaces within the home to accommodate her family.

This structure, as described by the applicant, is an accessory structure for the purpose of a home office. Home office would be permitted accessory use.

Appendix A.4 Definitions, gives the criteria a structure must meet in order to be defined as Accessory Use. Of note:

(2) It is subordinate to and serves a principal building or a principal use;

(3) It is subordinate in area, extent or purpose to the principal building or principal use served;

(4) It contributes to the comfort, convenience or needs of occupants, or business in the principal building or the principal use served;

In order for the home office to be considered a compliant accessory use on this property, it should, by definition, contribute to the comfort, convenience or needs of the occupants, or business in the principal building or principal use served. Ms. Carrara does have the principal structure on this property listed on Airbnb; because of this Staff does

have a concern that the accessory structure may not be utilized consistent with the regulations if Ms. Carrara intends to utilize the home office when she is not actually occupying the home, but rather the home is being rented to others.

5. Given that both indoor and exterior shower facilities have been installed in the structure, as well as a full-size refrigerator (no cooking facilities were installed upon Staff's last site visit), facilities that exist as part of the principal structure, Staff also has concerns about the intended occupancy of the accessory structure. While the Board imposed a condition restricting residential occupancy, and the applicant previously testified in sworn testimony of her intended use, Staff would suggest that the Board request further assurances from the applicant regarding the intended use of the structure and impose additional conditions.

As an amendment to a previously granted variance, staff will be available for further discussion of the request, however instead of providing a staff analysis for the required findings of fact below, staff would assert that should the Board of Adjustment find in favor of the requested amendment the following conditions be considered:

1. Use of the accessory structure shall be limited to only the housekeeping unit (as defined in the UDO) occupants of the principal structure.
2. Residential occupancy of the accessory structure shall be prohibited.
3. Plumbing shall be disconnected for the indoor shower as well as the outdoor shower and the outdoor shower shall be removed.
4. Authorization shall be given for an annual inspection of the interior of the structure to ensure continued compliance with the regulations of the Unified Development Ordinance as well as the conditions of the variance.
5. A copy of the executed decision on this approved variance shall be recorded at the Dare County Register of Deeds.

Ms. Wyatt then reviewed Staff's evidentiary documents: as-built survey, photographs of the completed accessory structure including decking stairs, and outside shower; and the application including the applicant's provided narrative. Ms. Wyatt stated that she as well as applicant Deborah Carrara and her attorney Casey Varnell were present and available to answer any questions.

Ms. Wyatt confirmed for Board Attorney Jay Wheless that based on Staff's findings she did not believe that the circumstances on the property had changed since the granting of the original variance.

Mr. Wheless asked if the amended variance would be equal to or less than what was originally granted. Ms. Wyatt confirmed that it would actually be an increase of the previous variance.

Ms. Wyatt confirmed for Mr. Varnell that if Ms. Carrara is not occupying the primary structure, she would not be able to utilize the accessory structure.

Ms. Wyatt confirmed for Mr. Varnell that Staff would expect the applicant to be present during any inspections.

Ms. Wyatt confirmed for Mr. Varnell that while there was no discussion with regards to access to the structure, the applicant was aware that the structure needed to meet flood ordinance.

Evidence presented by
Applicant

Mr. Varnell briefly addressed the Board and noted that all of the conditions for granting of the original variance remain the same, the septic issue remains so the same hardship still exists. Mr. Varnell noted that Ms. Carrara is just wanting to get access to the structure.

Mr. Varnell proceeded to question applicant and property owner, Debbie Carrara.

Ms. Carrara confirmed for Mr. Varnell that she knew from the beginning that the structure would need to be raised but she didn't realize the steps were considered part of structure. Ms. Carrara stated that the pilings were higher than they needed to be but building supplies were limited due to Covid.

Ms. Carrara explained to Mr. Varnell that they had planned to have smaller doors, but they were finding it hard to find smaller doors that swung out. The doors are larger than anticipated so they had to have a larger landing to meet code. Ms. Carrara noted that she had to make other changes to the structure including changing windows and lowering the roof line.

Ms. Carrara confirmed for Mr. Varnell that she did not feel she was asking for more than what the original variance had granted; she is not asking for a larger habitable space.

When Mr. Varnell asked Ms. Carrara why she needed an outdoor shower, she confirmed that she was not in town for the entirety of the construction; she had a project manager and plumber who made decisions when she wasn't there. She noted most houses have an outside shower and that it's smaller than the standard kind.

Mr. Varnell then asked Ms. Carrara about the interior shower; she stated that the plumbing was shown on the plan and originally it was meant to be used for a pet wash. Her pet passed around the time of construction and her project manager suggested turning it into a shower.

Ms. Carrara confirmed for Mr. Varnell that in the past she has not AirBnB'd the house for the entire summer; she wanted a garage refrigerator to keep extra items.

Ms. Carrara confirmed for Mr. Varnell that the landing and steps cannot

be moved elsewhere on the property without moving the septic system.

Ms. Carrara confirmed for Mr. Varnell that she works in the insurance industry and the term "dwelling" is a common term used for insurance purposes; it has nothing to do with sleeping or habitational occupancy.

Mr. Varnell asked Ms. Carrara what was the purpose/intended use of the structure? Ms. Carrara stated that she wants to be able to use it, not just when guests are there; she will be putting a desk and internet and she wants to be able to utilize it. She is not planning to live in it and she is not trying to rent it out as a separate unit.

Mr. Mascaro reminded Ms. Carrara that at the first hearing they never discussed having an outdoor shower. Ms. Carrara stated it was her plumber's idea to do one.

Ms. Carrara confirmed for Mr. Mascaro that the doors to the structure swing out so they were required to have a landing by building code they can't just have steps. Ms. Carrera noted that it was not the original door noted in the plans but they had to change the door and the windows due to availability issues.

Mr. Gentry noted that the structure has turned out very different from what was first presented. Mr. Gentry questioned if there was enough room in the loft for a mattress? Ms. Carrara noted she hasn't measured the loft area and is currently using it for storage.

Ms. Carrara confirmed for Ms. Burnette that the project manager she hired had worked as a project manager for a local builder.

Ms. Carrara confirmed for Ms. Burnette that the property is not her principal residence; her residence is in Raleigh, that's where she gets mail.

Ms. Carrara confirmed for Ms. Burnette that it was her plumber (who specializes in new construction) who decided to plumb for an outside shower.

Ms. Burnette asked what the urgency was to get the project completed? Ms. Carrara stated that she hadn't anticipated the project going on for so long, it was a stressful process, and it was a lot for her.

Ms. Carrara confirmed for Town Attorney Ben Gallop that she owns two properties in Dare County.

Ms. Carrara confirmed for Mr. Gallop that her other property is also on Memorial Ave in Nags Head and it only has a house, no accessory structure.

Ms. Carrara confirmed for Mr. Gallop that when she comes to the beach from Raleigh she stays in whichever house is not currently rented; other times she stays with friends but needs a place to work. She would like the option to be able to use the accessory structure to work

when the house is rented.

Mr. Gallop reviewed Staff's conditions for granting the variance. Ms. Carrara stated she had concerns with some of the conditions, especially the first condition because she feels like she should be able to use the accessory structure when the house is rented. Ms. Carrara stated she had no issues meeting the second condition.

Ms. Burnette questioned where Ms. Carrara would park to gain access to the accessory structure if the primary building was rented? Ms. Carrara stated she had not thought about it, but she believes there is room and enough allowable lot coverage to add another parking spot.

Mr. Varnell addressed the Board and made his closing arguments. Mr. Varnell stated that they do agree there have been changes from what was approved by the original variance. They understand the issue with the outdoor shower; however, the landing is a question of access. They had to build a larger landing due to supply issues with pilings and size and type of door. The steps and landing do not encroach into the originally varied setback.

Mr. Gallop noted that there were people in audience that wished to provide testimony.

Ms. Grace Shaeffermeier addressed the Board. Ms. Shaeffermeier owns property on Admiral Street, behind Ms. Carrara's property. She was notified and was aware of the original variance but once construction began, she was dismayed as the structure seemed to be much larger than what was proposed and approved. It did not seem like a home office; you don't need an outdoor shower or an indoor shower for a home office, the structure seems more like a tiny house. At best it seems like it would be used as a residence for the property owner and at worst it could be rented out. Ms. Shaeffermeier asked the Board to deny the variance request. Ms. Shaeffermeier also noted that Covid and supply issues are common hardships to all and that any hardships for this amended permit are the result of actions taken by the applicant. The request is not in keeping with the spirit of the ordinance as variance amendment is not less or equal to the previously granted variance.

Town Attorney Ben Gallop addressed the Board and gave his closing arguments. Mr. Gallop stated that Variance Amendments are granted in cases where there has been a substantial change in property circumstances. In Ms. Carrara's case nothing has changed, her hardship is a result of having the wrong people advising her; the hardship is not related to the property but to personal circumstances and Mr. Gallop believes the variance amendment should be denied.

Board Attorney Jay Wheless reviewed all the supporting documents from both Staff and the Applicant and the Chair accepted all documents into evidence.

The Chair closed the public hearing and opened it up deliberations.

After receiving some clarification from Mr. Wheless, the Board reviewed findings of fact:

The Board voted unanimously that strict application of the ordinance did not result in unnecessary hardship to the applicant.

The Board voted unanimously that the hardship did not result from conditions that were peculiar to the property (location, size, topography, etc.)

The Board voted unanimously that any hardship that exists were the result of actions taken by the applicant.

Ms. Burnette noted that many people who were in the process of building during COVID suffered similar hardships (inability or delays in finding necessary building materials).

The Board voted unanimously that the requested variance was not in the spirit of the ordinance.

The Board voted unanimously that the circumstances on the property have not substantially changed since the granting of the previous variance.

Mr. Mascaro noted that in fact "nothing has changed on the property".

The Board voted unanimously that the requested amendment was not equal or less than original variance and was actually more due to the addition of the outside shower.

Motion

Based on their findings and together with Staff's findings, John Mascaro moved to deny the Variance Amendment. Judy Burnette seconded, and the motion passed by unanimous vote

The Board took a break, the time was 10:36 AM

The Board reconvened the time was 10:47

Order

The Board of Adjustment of the Town of Nags Head (the "Board") held a public hearing on September 9, 2021, to consider a variance amendment application submitted by property owner Deborah Carrara (the "Owner") seeking to amend the previously granted variance from the requirements of Section 8.6.3.5.4, Yard Requirements for Accessory Structures with Habitable Space, of the Unified Development Ordinance (the "UDO") as to the property located at 2606 S. Memorial Avenue, Nags Head. The Board, having heard all of the evidence and arguments presented at the hearing, makes the following **FINDINGS OF FACT**:

1. The Owner owns the Property.
2. The property is located within the C-2, General Commercial Zoning District with adherence to the R-3, High Density Residential Zoning District dimensional requirements for

residential development.

3. Section 8.6.3.5.4 of the UDO requires that accessory structures with habitable space meet the setbacks of the principal structure regardless of location on the lot.
4. The Owner was granted a variance on March 11, 2021, to construct a 10' x 16' accessory structure for use as a detached home office with air conditioning and restroom facilities.
5. Upon review of an as-built survey, it was noted that the constructed structure deviated from the parameters of the original variance by: a. Exceeding the approved dimensions with a structure measuring 10.3' x 16.3'. b. Including a 7-foot-wide deck/landing, a 3-foot-wide set of stairs, and a 4' x 5' outdoor shower, none of which were depicted in the original variance application or permit. c. Including an indoor shower, contrary to testimony provided during the original variance hearing.
6. The Owner attributed changes to the structure to supply chain issues caused by the COVID-19 pandemic and decisions made by the project manager and plumber in her absence.
7. The amended variance request seeks approval for the deviations outlined above, which represent an increase in nonconformity beyond the parameters of the original variance.
8. Town Staff expressed concerns about the use and compliance of the accessory structure, including the potential for residential occupancy and lack of adherence to original testimony and application materials.
9. Town Staff determined that: a. Circumstances on the property have not substantially changed since the granting of the original variance. b. The requested amendment represents an increase in the variance rather than an equal or lesser variance. c. The hardship claimed by the Owner results from personal circumstances and decisions made during construction rather than conditions peculiar to the property.
10. A neighboring property owner testified that the structure's changes make it appear more like a tiny house rather than a home office and expressed concerns about its intended use and potential rental occupancy.

Based on the above Findings of Fact, and considering the burdens of proof and persuasion being on the Applicant, 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 Amendment.
2. Conclusions Regarding Specific Variance Amendment Criteria

established by Section 3.10 of the Unified Development Ordinance:

- (a) A strict application of the ordinance **does not** result in an unnecessary hardship to the Applicant/Owner.
- (b) The hardship claimed **does not** result from conditions that are peculiar to the property, such as location, size, or topography.
- (c) The hardship **does** result from actions taken by the Applicant/Owner or their agents.
- (d) The requested variance amendment **is not** consistent with the spirit, purpose, and intent of the ordinance, such that public safety is secured, and substantial justice is achieved.
- (e) The circumstances on the property **have not** substantially changed since the granting of the prior variance.
- (f) The requested amendment **is not** equal to or less of a variance than the previously granted variance but represents an increase in the variance.

THEREFORE, based upon all of the foregoing, the application for an amendment to the previously granted variance is **DENIED**.

Evidence presented by
Town

Ms. Wyatt presented a survey for the Board's review and explained that Michael McVearry, property owner, had submitted this variance request from the following section of the Unified Development Ordinance for the property located at 6812 S. Virginia Dare Trail, Nags Head:

Section 7.78 – Walls and Fences, as it pertains to maximum fence height.

Section 7.78.3 states that within any residential district and within any other district where the existing or proposed principal permitted use of the property is single-family or two-family residential, no wall or fence shall exceed four feet in height within a front yard or the frontward one-half portion of the side yard or six feet in height in a rear yard or the rearward one-half portion of the side yard.

This property is zoned C-2, General Commercial, and has been developed with a single-family dwelling. The boundary line fence constructed along both the northern and southern property lines is noncompliant with respect to the maximum allowable fence height of 4 feet within the front yard and frontward one-half portion of the side yard. As required by Section 7.78.3 noted above, at the mid-point of the home the height of the existing 6-foot-tall fence shall be lowered to a height no greater than 4 feet and maintained at 4 feet or less for the remainder of the desired front yard fencing.

The property owner has constructed fencing that is 6 feet in height at the midpoint of the home and remains at 6 feet in height up to within

25 feet of the front property line. The fence then drops down to a noncompliant 5 feet in height for a distance of approximately 6 feet, and then is lowered once more to a compliant 4 feet in height. The survey presented was marked up by Staff denoting the areas of noncompliance.

The property owner indicated to Staff at the time of the final zoning inspection that he constructed the fence at 6 feet in height to obscure visibility of the HVAC pump and gas tanks on the adjoining property. The property owner has indicated within the application that "hard work & design went into [the] fence project, to cut it down would be a hardship."

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

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.

While staff understands the property owner's desire to obscure the neighboring utilities and appreciates the effort and expense that went into the fence construction, the applicant has not demonstrated that at an unnecessary hardship exists for which a variance must be granted to overcome.

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.

Staff is of the opinion that no unnecessary hardship exists and that there are no conditions that are peculiar to this particular property that support the granting of a variance. The size, shape and topography of the applicant's property, not to mention the visibility of mechanical equipment on abutting property, are not uniquely different from other properties located within the Town.

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. 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 would submit that the hardship claimed by the property owner is a result of actions taken by the property owner, and thus self-created.

The property owner constructed the fence along both the north and south property lines at a height in excess of what the Unified Development Ordinance permits. Additionally, it is important to note that the property owner only indicated construction of a pool fence on

the original development permit application and did not subsequently revise the application to reflect the boundary line fence. It was upon final zoning inspection that the noncompliant boundary line fence height was noticed. Had the property owner sought the required zoning permit for construction of the fencing, the height requirements would have been provided in writing.

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 submits that the requested variance, as presented, is not consistent with the spirit, purpose, and intent of the ordinance such that public safety is secured and substantial justice is achieved. The applicant has not identified a clear hardship, and additionally, substantial justice would not be achieved as all residentially developed properties with fencing must adhere to the same maximum height requirements.

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 front porch encroachment does not create practical difficulties or unnecessary hardship for the applicant and for this particular site.

Ms. Wyatt confirmed for Mr. Mascaro that if the fence height were to be reduced it would have no effect on the pool fence as the boundary fence is separate from the pool fence.

Ms. Wyatt confirmed for Chair Suppler that part of the reasoning of having the lower height in the front is for visibility and public safety issues (line of sight).

Ms. Lowe asked if was not the owner's responsibility to know how tall the fence could be built? Ms. Wyatt agreed noting that if the property owner had amended his permit application to include the boundary fence, Staff would have advised him of fence height regulations at that time.

Evidence presented by
Applicant

Michael McVearry addressed the Board and noted that he had built the house and fence. He had heard that that the reason for the 4-ft fence height had to with the 30-foot front yard setback and the ability to see the road. In his case however, his neighbors' houses (on either side) are much older and only have a 10-foot front yard setback. He built the fence taller for his need for privacy as well as for his neighbors to have some privacy. Mr. McVearry stated that the view is not impeded, and it would be of no benefit for anyone to tear the fence down.

Mr. McVearry confirmed for Mr. Mascaro that none of the neighbors have said anything about the fence. Mr. McVearry stated he designed the fence to look visually appealing.

Amy Underwood addressed the Board. Ms. Underwood owns the two small houses (cottage court) on the north side of Mr. McVearry. Ms. Underwood stated she actually would like to see the fence reduced to the maximum 4 ft. height. She rents out the two houses and stated that the taller fence impedes the visibility and ability of people coming in and out of drive aisle, especially for those that have to back out onto Virginia Dare Trail.

Ms. Wyatt referred to the survey and confirmed for Ms. Lowe and the Board that the fence can go right up to the front property line, as long as it's no taller than 4 feet. Ms. Wyatt confirmed that Mr. McVearry would have to reduce the fence up to the midpoint of the house.

Ms. Underwood confirmed that reducing the fence height (up to the midpoint) would make it easier for someone backing out of the drive aisle at her property.

Mr. McVearry briefly addressed the Board noting that he believes reducing the fence height would only help the front cottage not the back cottage. The fence benefits both property owners as it clearly denotes the property lines and reducing the height would make the fence look unsightly.

Mr. Gallop gave a brief closing argument stating that it does not look like an unnecessary hardship and any hardship that may exist was a result of Mr. McVearry's own actions.

Mr. Wheless reviewed all the supporting documents (from Staff and the Applicant).

Chair Suppler accepted all the documents into evidence, closed the public part of the hearing and opened it up for deliberations.

The Board proceeded to review the findings of fact:

The Board voted unanimously that No, strict application of the ordinance did not result in an unnecessary hardship to the applicant.

The Board voted unanimously that No, any hardship that exists did not result from conditions that are peculiar to the property.

The Board voted unanimously that any hardship that may exist is a result of actions taken by the applicant.

Finally, the Board voted that No, the variance request would not be in keeping with the spirit of the ordinance.

Motion

Based on their findings and together with Staff's findings, Judy Burnette moved to deny the variance request. Bobby Gentry seconded, and the motion passed by unanimous vote

Order

The Board of Adjustment of the Town of Nags Head (the "Board") held a public hearing on September 9, 2021, to consider a variance application submitted by property owner, Michael McVearry (the "Owner"), seeking to vary the requirements of Section 7.78, Walls and Fences, of the Unified Development Ordinance (the "UDO") as it pertains to maximum fence height for the property located at 6812 S. Virginia Dare Trail, Nags Head. The Board, having heard all of the evidence and arguments presented at the hearing, makes the following **FINDINGS OF FACT:**

1. The Owner owns the Property.
2. The property is located within the C-2, General Commercial Zoning District, and has been developed with a single-family dwelling.
3. Section 7.78.3 of the UDO establishes that within any residential district and within any other district where the existing or proposed principal permitted use of the property is single-family or two-family residential, no wall or fence shall exceed four feet in height within a front yard or the frontward one-half portion of the side yard or six feet in height in a rear yard or the rearward one-half portion of the side yard.
4. The Owner constructed a boundary line fence along both the northern and southern property lines that is noncompliant with respect to the maximum allowable fence height of 4 feet within the front yard and frontward one-half portion of the side yard. The fence is 6 feet in height up to within 25 feet of the front property line, 5 feet in height for a distance of approximately 6 feet, and 4 feet in height for the remainder.
5. The Owner indicated that the fence was constructed at 6 feet in height to obscure visibility of the HVAC pump and gas tanks on the adjoining property and to provide privacy for both the Owner and neighbors.
6. The Owner did not amend the original development permit application to reflect the construction of the boundary line fence. Upon final zoning inspection, the noncompliance was noted.
7. The property owner of the adjoining northern property stated that the taller fence impedes visibility and safety for vehicles exiting the property onto Virginia Dare Trail.
8. Staff presented a survey marked to indicate the areas of noncompliance and provided the following findings:

a) Unnecessary hardship would not result from the strict application of the UDO. The applicant's desire for privacy and to obscure neighboring utilities does not constitute an unnecessary hardship.

b) The hardship does not result from conditions that are peculiar to the property. The size, shape, and topography of the applicant's property, as well as visibility of mechanical equipment on the abutting property, are not uniquely different from other properties in the Town.

c) The hardship results from actions taken by the Owner, who constructed the noncompliant fence without seeking a required permit or confirming the height regulations.

d) The requested variance is not consistent with the spirit, purpose, and intent of the ordinance. Allowing the variance would undermine public safety and visibility requirements, which are essential for properties with frontage on Virginia Dare Trail.

Based on the above Findings of Fact, and considering the burdens of proof and persuasion being on the Applicant, 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) Strict application of the ordinance **does not** result in an unnecessary hardship to the Applicant.

b) The hardship **does not** result from conditions that are peculiar to the property.

c) The hardship **does** result from actions taken by the Applicant.

d) The Requested Variance **is not** consistent with the spirit, purpose, and intent of the ordinance.

THEREFORE, based upon all of the foregoing, the application for a variance to allow a 6-foot fence within the front yard and frontward one-half portion of the side yard is **DENIED**.

Evidence presented by Town Ms. Wyatt presented a variance request submitted by property owners Steven and Deborah Jones from the following section(s) of the Unified Development Ordinance for the property located at 100 E. Sandcastle Court, Nags Head:

Section 11.44 – Provisions for Flood Hazard Reduction.

11.44.2.1. Residential Construction. New construction or substantial improvement of any residential structure shall have the reference level, including the basement, elevated no lower than the regulatory flood protection elevation, as defined in Appendix A.

Appendix A. – Definitions - Regulatory Flood Protection Elevation (RFPE) means the Local Elevation Standard (LES). The Local Elevation Standard is a locally adopted elevation level used as the Regulatory Flood Protection Elevation (RFPE) to mitigate flood hazards in the Shaded X, X, AE, AO, VE, as depicted on the FIRM maps for Nags Head. These areas may be vulnerable to flooding from storm surge, wind-driven tides, and excessive rainfall. Many of these areas have repetitively flooded and continue to remain at risk to flooding.

Coastal High Hazard Areas (CHHA) - Properties located to the east of NC 12 and SR 1243 are located in an active oceanfront environment that is vulnerable to storm surge, erosion, sea level rise, and other hazards. These areas have special flood hazards associated with high velocity waters from storm surges or seismic activity and, therefore, the RFPE is 12 feet NAVD 1988.

11.44.3. Discuss Coastal High Hazard Areas (Zones VE) and Properties East of NC 12 and SR 1243 (which this property is located in).

11.44.3.3. All new construction and substantial improvements, including properties with elevations above the regulatory flood protection elevation, shall have the space below the bottom of the lowest horizontal structural member of the lowest floor either be free of obstruction or constructed with open wood latticework or insect screening so as not to impede the flow of floodwaters.

Ms. Wyatt explained that any new construction or substantial improvement would need to meet that 12 ft. RFPE as well as the free of obstruction requirements.

Ms. Wyatt noted that the applicants provided an Elevation Certificate which states that the top of the bottom floor (basement, crawlspace, or enclosure) is at an elevation of 10.21 feet. Ms. Wyatt noted that when the property was originally constructed it was likely not in a 12 ft. RFPE. Now, the property is non-conforming with regards to the FEMA flood elevation.

Mr. and Mrs. Jones are requesting the variances necessary to allow the construction of a ground floor enclosure, below the RFPE of 12 feet. The proposed enclosure would consist of a handicap accessible

bedroom with an ADA compliant bathroom as well as an additional bedroom and bathroom for his wife and caretaker. Mr. Jones has noted that he is disabled and having this space would provide both he and his wife a handicap accessible area to stay in should there be a loss of power or issue with the elevator.

While the most recently adopted FEMA Flood Maps place this property within an X Flood Zone, the Town of Nags Head Flood Damage Prevention Ordinance sets forth standards that subject this property to a Local Elevation Standard (LES)/RFPE of 12 ft. and V-Zone construction standards based upon its location east of NC 12.

The applicant has provided a ground floor plan depicting the existing enclosed areas both habitable and storage, below the Regulatory Flood Protection Elevation of 12 ft. mean sea level; this renders the existing improvements below the RFPE noncompliant with the flood damage prevention ordinance, and any allowance for additional enclosed space would result in an increase in the degree of noncompliance.

Additionally, Section 11.44.3.3 of the Unified Development Ordinance, provided above, would be applicable to this situation. This section requires that all new construction and substantial improvements, including properties with elevations above the RFPE, shall have the space below the bottom of the lowest horizontal structural member of the lowest floor either be free of obstruction or constructed with open wood latticework or insect screening so as not to impede the flow of floodwaters. As derived from the elevation certificate, this area free of obstruction is not present for this structure on this property, thus creating an additional area of noncompliance.

Ms. Wyatt noted that the areas of noncompliance that have been identified may continue to exist and be repaired and maintained in their current state, they cannot however, under the Unified Development Ordinance, be expanded or increased in area, and the structure would be subject to substantial improvement limits which may require existing noncompliant aspects to be resolved depending on the cost of improvements within a twelve (12) month period.

Ms. Wyatt explained that because this is a variance request from the Flood Ordinance there are additional criteria that need to be considered; Ms. Wyatt noted that this criteria was listed as part of her staff memorandum.

The ordinance requires that "A written report addressing each of the above factors shall be submitted with the application for a variance". The property owners have provided a written report addressing these items which was included in the Agenda Packet.

Ms. Wyatt explained that Staff had not provided an analysis for the standard findings outlined in Section 3.10.1 as this request does present some unique considerations, and additional information should be submitted to allow for a complete consideration of the issues; most

notably, Staff would recommend that the Board request a written report from a licensed professional with respect to the criteria provided in Section 11.43.7 demonstrating the un-likelihood that this requested enclosure would result in negative impacts to the property owners, neighboring properties and lands, and the general area.

Staff does acknowledge that some level of hardship likely exists, and would note that upon the adoption of Chapter 160D revisions, the finding set forth in Section 3.10.1.2 has now been amended to reflect that 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, considerations that are apparent in the request being made by Mr. & Mrs. Jones.

Whether the Board is inclined to deliberate this request and consider granting of the requested variances, or continue to allow for further information and evidence to be presented, Staff would ask that the Board consider the following:

- While the mechanical components of an elevator must be located above the regulatory flood protection elevation, an elevator shaft is permitted below the regulatory flood protection elevation. As such, would an updated elevator and/or addition of a generator alleviate the need for the ground floor enclosure and/or resolve the stated hardship and better comport with the spirit, purpose, and intent of the ordinance?
- Is there value to requesting that all construction below the Regulatory Flood Protection Elevation of 12 feet mean sea level be floodproofed?
- Additionally, should consideration be given to requiring that the two bedrooms and bathrooms be removed/dismantled should the current property owner no longer own the property?
- Is there a reason why the existing enclosed and habitable ground floor area could not be renovated to address the same needs identified by the property owner?

Based upon the above, Staff would support a request for a continuance to allow an appropriately licensed professional to address the flood-specific criteria listed under Section 11.43.7.

Ms. Wyatt reviewed the evidence provided by the applicant and stated that Mr. and Mrs. Jones were present and available to answer any questions for the Board.

Ms. Wyatt confirmed for Chair Supplier that if the elevation certificate had come in at 12' there would still be a need for a variance because of the free of obstruction rule.

Ms. Wyatt confirmed for Mr. Mascaro that as the house is part of the Village at Nags Head, that if the variance were to be granted prior to

permitting they would need something from Carolina Water approving the additional 2 bedrooms.

Ms. Wyatt confirmed for Ms. Lowe that the lot does appear to be elevated and some fill may have been brought in at the time of construction.

Ms. Wyatt and Mr. Wheless discussed the report that was submitted by the applicants addressing the criteria listed under Section 11.43.7 and confirmed that she was unaware if the UDO defined "report". Mr. Wheless noted that it would be important to know if the UDO required a report from a professional.

Ms. Wyatt confirmed for Mr. Jones that the "free of obstruction" rule is 18" above the 12 feet.

Evidence presented by
the Applicant

Mr. Steve Jones addressed the Board. Mr. Jones explained that when they built the house in 1996, he was not disabled. He has since been diagnosed with Muscular Dystrophy which is a progressive illness that has progressed throughout the years. They are the original owners and Mr. Jones confirmed that they did raise the elevation about 2 feet when the house was built. Mr. Jones stated that since they have owned the lot, they have never had water on the property.

Mr. Jones stated that they had read Staff's comments and recommendations but explained that the hardship would not be alleviated by updating the elevator and getting a generator. Mr. Jones needs assistance using the elevator (he can't use it if he is home alone). The elevator does not accommodate his scooter and they had to make some adjustments (including some ramps) so that he could ride the elevator. Mr. Jones presented a photo of himself on his scooter inside the elevator. Mr. Jones stated that he is unable to walk and currently their bedroom is on the third floor but the bathroom on that floor is not completely ADA accessible; he has to use the second-floor bathrooms for some activities (shower/sink) which makes it hard when there are additional people in the house (family or other guests).

Mr. Jones discussed Staff's suggestion that if the variance were to be granted that consideration be given to requiring that the two bedrooms and bathrooms be removed/dismantled should the current property owner no longer own the property. Chair Suppler confirmed for Mr. Jones that this is something the Board has done previously when granting variances particularly when it comes to handicap ramps.

Mr. Jones stated that he had done a lot of research under the Fair Housing Act and ADA due to his condition. They have provisions with regards to reasonable accommodations and modifications. Mr. Jones reviewed some legislation from HUD related to ADA rules and stated that he believes he meets the criteria where a requested reasonable accommodation/modification may be necessary when there is relationship between the requested accommodation and the individual's disability; in this case his inability to walk.

Mr. Jones further explained that due to the existing house layout he would not be able to convert the existing downstairs habitable area into an ADA accessible area.

Mr. Jones testified he would use flood resistant materials including FEMA approved non-paper-faced gypsum board and spray insulation to build the enclosure and he would be willing to do anything else to mitigate any flood issues that might occur.

Mr. Jones confirmed for Mr. Mascaro that the house is on a reverse floor plan with the kitchen, living area and master bedroom on the third floor. Mr. Jones also confirmed that he does not have enough room in the third floor to make everything ADA compliant.

Mr. Jones confirmed for Mr. Mascaro that they would like to replace the elevator at some point in the future, but it will be a costly project.

Mr. Jones explained for Mr. Mascaro that he needs both bedrooms downstairs as one would be for his caretaker (wife).

Mr. Jones confirmed that it's not their permanent residence although they have discussed it; while they have rented it out in the past it is currently used as a second home. Around 2010 he got to the point where he could no longer walk and at that point the house became almost unusable for him. Mr. Jones does not feel he has reasonable use of house so he doesn't come down as often as he would like.

Mr. Jones confirmed for Chair Supler that the proposed square footage of the addition would be 503 Square Feet as shown in the plans.

Mr. Jones confirmed for Ms. Burnette that he would be willing to provide a list of materials and the placement of all proposed electrical and plumbing.

Mr. Gallop gave a brief closing summary stating that the question is "what is and what is not a reasonable accommodation?". Mr. Gallop stated that flood variances are more complicated and noted that the Board must decide what is the minimum necessary considering the flood hazard, to afford relief? Mr. Gallop noted that there seems to be a hardship due to disability but there are other questions that don't yet have clear answers. Mr. Gallop also suggested that the Board have a list of conditions that someone could be held to if they were to grant the variance. Mr. Gallop suggested that they may want to continue the hearing to allow the applicant to put that together and maybe consult with his Design Professional or other expert.

Mr. Gallop also noted that he did not think that there is anything from the Town that requires an expert's report, however having those reports would help support the applicant's position and help support the Board's decision. Mr. Gallop also explained that the rating system for Flood Insurance looks at variances that are granted from flood provisions and these variances could affect the Town's rating. The

more expert evidence provided helps with that rating; while expert testimony is not required assists in making decisions that may affect insurance rate issues.

Mr. Wheless reviewed all the submitted documents and Chair Supplier admitted all into evidence.

Mr. Wheless agreed that having an expert report would be helpful for the Board and helpful down the road in deciding whether something is necessary vs. reasonable/appropriate and weighing it against public safety and making something that is already non-compliant even more so.

Mr. Gentry stated that an engineering report would probably show that the proposed addition is a better alternative to redesigning the other floors.

Ms. Burnette stated that it looks like the applicant has put a lot of thought into this but there are some unanswered questions, and she would like to give him an opportunity to supply additional information.

Mr. Mascaro did not feel that an expert report was necessary.

After some further discussion the Board and the applicant agreed to continue the hearing to give him some time to gather the necessary information.

Motion

Judy Burnette moved to continue the item; Bobby Gentry seconded the motion and it passed with a vote of 4 to 1 with John Mascaro casting Nay vote.

Continued to the next regular meeting of the Board.

Approval of Minutes

John Mascaro moved to approve Minutes from the March 11, 2021, meeting. Judy Burnette seconded the motion, and it passed by unanimous vote

Adjourn

There being no further business to discuss, the meeting was adjourned at 12:31 PM.

Respectfully Submitted,
Lily Campos Nieberding