

**Town of Nags Head
Board of Adjustment**

March 11, 2021

The Board of Adjustment of the Town of Nags Head met in regular session Thursday, March 11, 2020. Due to Covid restrictions this meeting was held 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, Don Milbrath

Others Present Kelly Wyatt, Michael Zehner, Ben Gallop, Jay Wheless, Andy Garman, Ed Snyder, Margaux Kerr, Lily Nieberding (via Zoom)

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 two items being brought before the Board this morning:

1. Variance request submitted 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.
2. Appeal of an Administrative Decision submitted by Robert Hornik of The Brough Law Firm on behalf of Brindley Beach Vacations and Sales with regard to issuance of a Notice of Violation for occupying and utilizing a space located at 2210 S. Croatan Highway, in violation of the provisions of the Town's Unified Development Ordinance.

Chair Suppler provided an overview of the Board of Adjustment and how it functions. Ms. Suppler then swore in all witnesses.

Evidence presented by Town Deputy Planning Director Kelly Wyatt explained that Deborah Carrara, as the applicant and property owner, had submitted a variance request from the following section of the Unified Development Ordinance (UDO) for her property located at 2606 S. Memorial Avenue:

Section 8.6.3.5 – Yard Requirements for Accessory Structures.
8.6.3.5.4. Accessory structures with habitable space shall meet the setbacks of the principal structure regardless of location on the lot.

Ms. Wyatt explained that Ms. Carrara is seeking to locate a 10'x16' accessory structure in the rear yard of her property to be utilized as a detached home office with air conditioning and restroom facilities for convenience. In discussing this with staff, Ms. Carrara was notified that

accessory structures with habitable space must meet the minimum principal structure setbacks, in this case meaning a 30-foot setback from the rear property line.

Due to the location of the existing septic system and the required setback between the septic area and structures, Ms. Carrara determined that she would be unable to meet the 30-foot required for setback for zoning purposes and not infringe upon the septic system. Ms. Wyatt explained that Ms. Carrara is asking for a 10 foot reduction from the rear yard setback requirement.

Ms. Wyatt then 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.

Staff submits that the strict application of Section 8.6.3.5.4 likely does create a hardship in this particular circumstance due to the location of the septic system. In review of the site plan and in conjunction with the dimensions of the property, it does not appear that the conventional septic system could be relocated/shifted in such a way as to create a location for the requested accessory structure in compliance with the required 30-foot setback without a wastewater system redesign.

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.

Despite the lot being generally consistent in terms of size, shape and topography of others in the neighborhood, Staff is of the opinion that the location and size of the septic system present a unique condition that impacts the siting of the proposed accessory structure, therefore creating 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.

Staff is unaware of any actions taken by the applicant/property owner that resulted in conditions associated with the variance request. The current owner purchased the home and property in its current state, and as noted in their application, has taken no actions to contribute to the stated hardship.

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, with the imposition of a condition precluding residential occupancy, 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 a reduction of the required rear yard, the limited building envelope for an accessory structure due to the configuration of the conventional septic system results in constrained development options. The proposed accessory structure, as conditioned, does not derogate from the spirit, purpose and intent of the ordinance.

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 rear yard setback reduction does create practical difficulties or unnecessary hardship for the applicant and for this particular site and would therefore recommends that the Board grant the requested variance with the following conditions:

1. Residential occupancy of the accessory structure shall be prohibited.
2. A copy of the executed decision on this approved variance shall be recorded at the Dare County Register of Deeds.

Ms. Wyatt confirmed for Ms. Lowe that the applicant is looking to build a 10' X 16' accessory structure.

Ms. Wyatt confirmed for Chair Suppler that the ordinance considers conditioned space as habitable. The structure will not have a kitchen or other living area. Ms. Wyatt stated that it would have to meet all the requirements of the code, including height and be flood compliant.

Mr. Milbrath expressed concern about what kind of precedent would be set if they were to grant the variance. Mr. Milbrath noted that there are many lots down Memorial and Wrightsville Avenues that most likely have the same type of septic system.

Ms. Wyatt explained that no decision made by the Board (of Adjustment) is precedent setting. Every single property and request stands on its own. Ms. Wyatt agreed that while many of the lots in the neighborhood are of similar size, they may have different types of septic systems, innovative vs. conventional, different layouts, etc.

Mr. Milbrath inquired how Staff would ensure that the condition that it not be used for residential occupancy is adhered to. Ms. Wyatt confirmed that if there was any indication of a violation, the Town has a Code Enforcement Officer. Ms. Wyatt also reminded Mr. Milbrath that the other condition is that if the variance is granted that the order be recorded with the deed so that future owners are aware. Mr. Milbrath expressed concern about the possibility of it being converted into residential occupancy and how it will be managed in the future.

Mr. Gentry differed with Mr. Milbrath noting that there are full time neighbors around the property and additional/excess parking would be noticed. Mr. Gentry also noted that having a bathroom there made

sense for a workspace.

Ms. Wyatt confirmed for Mr. Gentry that the lot coverage would be compliant.

Ms. Wyatt confirmed that the proposed bathroom would tie into the septic and the project will need Health Department approval.

Ms. Wyatt confirmed for Ms. Lowe that the proposed accessory structure would have to meet North Carolina Building Code as well as the Flood Ordinance.

Evidence presented by
Applicant

Debbie Carrera, property owner and applicant addressed the Board.

Ms. Carrera noted that her house is an older, small house. Many houses in her neighborhood have pools. She does not have a pool and she has a house that is less than 900 square feet. The house was built in the 40's and has only two small closets one of which houses the hot water heater. She is very limited in storage space; other than storing things under the bed there is a small area under the house which is exposed to the elements.

She works as an insurance agent and due to Covid she has been working from home from the kitchen table. With her family at home that has resulted in a hardship because she ends up having to move her things at lunch or her family has to go outside. She wants to have room to be able to work and do the things she needs and still have room for her family when they come to visit.

Ms. Carrera respects the Town's rules and wants to do the right thing and be part of the community. The bathroom that she is proposing is a half bath; there would be no shower. The accessory structure would give her some privacy to work and exercise as well as much needed storage space.

She wants to be respectful of the process and is willing to comply with what is required of her as she wants to do things the right way; she does not want to create an eyesore.

Mr. Carrera confirmed for Mr. Milbrath that if the variance were to be granted, she would be fine with the 10' X 16' and has no interest in making it larger; she wants to put a loft in for more storage and have air-conditioned space; she is not looking to create an opportunity to have decks or anything.

Board Attorney Jay Wheless reviewed all the documents submitted and Chair Supplier admitted all exhibits into evidence. Chair Supplier then closed the Public Hearing and asked for discussion.

Mr. Mascaro noted that more and more of these types of structure are being built across the country. It's a workspace and she (the property owner) does not have a lot of room in the house, and it would be a fairly easy and cost-effective thing to do. Chair Supplier agreed noting

that this was especially true now due to people working more from home because of Covid.

Mr. Gentry also agreed noting that it was a reasonable request and made perfect sense. The home is an old Nags Head style house in the middle of much larger newer structures that take up a lot more space in the same lot size she has. Mr. Gentry stated that they are going to see more requests like this one as more people move down here.

Chair Suppler agreed that the placement of the septic is peculiar as newer systems are usually in the front. It would not be cost effective on any level to move the septic system just for that.

Mr. Mascaro agreed noting that there is probably no room to be able to relocate the system in the front yard.

The Board voted unanimously to move directly to reviewing the findings of fact.

Does strict application of the ordinance result in an unnecessary hardship?

Chair Suppler agreed with Staff's findings that it would be difficult if not impossible to relocate the septic system. The Board voted 4 to 1 that Yes, strict application of the ordinance did result in an unnecessary hardship with Don Milbrath casting the Nay vote.

Does the hardship result from conditions that are peculiar to the property? The Board agreed with Staff's finding and voted 4 to 1 that Yes it does, with Don Milbrath casting the Nay vote.

Does the hardship result from actions taken by applicant? The Board agreed unanimously that No, it did not. The Board agreed that the applicant has done nothing to create the hardship and taken no actions to change the location of the structures on the property and it was in the same state as it was when purchased.

Is the requested variance in keeping with the spirit and intent of the ordinance? The Board voted unanimously that it was.

Motion

Based on their findings and together with Staff's findings the Board voted unanimously to grant the variance reducing the rear yard setback from 30 to 20 feet and that said variance be subject to two conditions:

- 1) Residential occupancy of the structure be prohibited and
- 2) A copy of the executed decision be recorded at the Dare County Register of Deed's office

Order

The Board of Adjustment of the Town of Nags Head (the "Board") held a public hearing on March 11, 2021, to consider a variance application submitted by property owner, Deborah Carrara (the "Owner") seeking to vary 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, Yard Requirements for Accessory Structures states:
8.6.3.5.4. Accessory structures with habitable space shall meet the setbacks of the principal structure regardless of location on the lot.
4. The Owner is seeking to locate 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 restroom facilities for convenience.
5. The principal setback for rear yard within the R-3, High Density Residential Zoning District, is 30 feet. The Owner is seeking a variance of 10 feet from this requirement resulting in a rear yard setback for the proposed habitable accessory structure of 20 feet.
6. The property owner is seeking this variance due to the inability to locate the accessory structure in a manner that will meet the required 30-foot rear yard setback based upon the location of the existing septic system and the required setback between the septic area and structures set forth by Dare County Environmental Health.
7. The UDO considers conditioned space as habitable, and per the Owner, the structure will not have a kitchen or other living area.
8. Construction of the desired accessory structure would have to comply with all of the requirements of the Unified Development Ordinance, including lot coverage, height and Flood Ordinance compliance as well as compliance with the NC Building Code.
9. If the variance is granted, it should include a condition that the order prohibiting residential use of the structure be recorded with the deed so that future owners are aware.

10. The Owner's home is an older, small home that is less than 900 square feet in area and that she is limited in storage space.
11. The Owner works as an insurance agent and due to the COVID-19 pandemic she has been working from home and as such has experienced hardship in having to move her work-related items from shared spaces in order to accommodate her family.
12. The Owner proposes to build a half bath in the structure with no shower.
13. The Owner would not need anything larger than 10' x 16', that she has no interest in making it larger as she does not want it to be an eyesore.

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) A strict application of the ordinance **does** result in an unnecessary hardship to the Applicant/Owners.
 - In review of the site plan and in conjunction with the dimensions of the property, it does not appear that the conventional septic system could be relocated/shifted in such a way as to create a location of the requested accessory structure in compliance with the required 30-foot setback with a wastewater system redesign.
 - (b) The hardship **does** result from conditions that are peculiar to the property, such as location, size, or topography.
 - Despite the lot being generally consistent in terms of size, shape and topography of others in neighborhood, the location and size of the septic system presents a unique condition that impacts the siting of the proposed accessory structure.
 - (c) The hardship **does 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.
 - The Owner purchased the home and property in its current state and has taken no actions to contribute to the stated hardship.

(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.

- With the imposition of a condition precluding residential occupancy, the variance is consistent with the spirit, purpose and intent of the ordinance such that public safety is secured, and substantial justice is achieved.
- The limited building envelope for an accessory structure due to the configuration of the septic system results in constrained development options therefore, with the condition precluding residential occupancy, the variance does not derogate from the spirit, purpose and intent of the ordinance.

THEREFORE, based upon all of the foregoing, the application for a variance of 10 feet from the minimum 30-foot rear yard setback for the purpose of constructing a 10' x 16' structure for home office use is **GRANTED** with the following conditions:

1. Residential occupancy of the accessory structure shall be prohibited.
2. A copy of the executed decision on this approved variance shall be recorded at the Dare County Register of Deeds.

Recess

The Board took a brief recess; the time was 9:32 AM. The Board reconvened and Board Attorney Jay Wheless reviewed the procedures for an appeal hearing.

Evidence presented by Town

Planning Director Michael Zehner explained that this appeal stems from a Notice of Violation issued by the Ed Snyder, the Town's Code Enforcement Officer on October 29, 2020, under Mr. Zehner's direction, noting violations of three provisions of the Town's Unified Development Ordinance.

Mr. Zehner reviewed these provisions in more detail:

1. Section 4.10.1 No use of land shall be initiated or modified... without having either a conditional use permit approved by the Board of Commissioners.... Or the necessary permits identified in Section 4.11 Permit Types... **The use of the subject property has been initiated without having the necessary permits.**
2. Section 4.13.1 No land shall be used or occupied... until a certificate of compliance shall have been issued by the UDO Administrator... **The subject property and identified tenant**

space are being used and occupied, and has been subject to a change of use, without a certificate of compliance having been issued.

3. Per Section 6.6, the use being conducted on the subject property and identified tenant space, determined to constitute a **Real Estate Rental Management Facility... is a use which is not permitted in the C-2 zoning district which is the current zoning for the property.**

These violations were found during a site inspection by Mr. Snyder completed on October 27th. Mr. Snyder had been previously notified by the Town's Tax Collector Linda Bittner who had noticed that a use was being conducted in that tenant space and she did not recall there being a business registration for any tenant in that space.

As part of his site inspection Mr. Snyder took photographs which were provided to the Board as part of the agenda packet. Mr. Snyder determined that the tenant space was being occupied by Brindley Beach Vacations & Sales.

That same day (October 27) Mr. Snyder discussed the photographs and his inspection with Mr. Zehner as well as the Town's Deputy Town Manager Andy Garman and Deputy Planning Director Kelly Wyatt.

Mr. Garman and Ms. Wyatt noted that in 2017, Doug Brindley, with Brindley Beach Vacations & Sales had inquired about occupying the space as an office. While Mr. Brindley had been provided with the Town's Change of Tenant/Use application form, there is no record of this application form being returned to the Town, and no records of inspections being performed, or approvals being granted.

Mr. Zehner communicated with Mr. Brindley (chain of emails were provided as part of the agenda packet) as well as Gloria Hargett, the representative for the property owner, who indicated that it was her understanding that the space was being used for the storage and distribution of linens for rental homes. Mr. Brindley indicated to Mr. Zehner that the original plan was for office space but then "we needed to have this distribution of laundry."

Mr. Zehner explained to Mr. Brindley that the use of Real Estate Rental Management Facility was not an allowable use in that district and then further clarified the definition of Real Estate Rental Management Facility use. Mr. Zehner informed Mr. Brindley that the Town would be issuing a Notice of Violation.

Mr. Zehner confirmed for Mr. Gentry that the dates noted in his Staff memorandum page two should have indicated 2020 and not 2021.

Mr. Zehner confirmed for Ms. Lowe that the property is classified as a Shopping Center. Mr. Zehner could not confirm how long the business had been operating out of that space as there are no permitting

records other than the correspondence going back to 2017. Mr. Zehner also confirmed for Ms. Lowe that it was Linda Bittner, the Town's Tax Collector who brought this to Staff's attention.

Mr. Zehner confirmed for Mr. Gentry that a Change of Use application had not been submitted to the Town.

Mr. Zehner confirmed for Chair Supplier that this use is not an allowable use in this Zoning District (C-2) and it is also not a use allowed in a mixed use development such as a Shopping Center.

Robert Hornik attorney for the appellant proceeded to question Mr. Zehner.

Mr. Zehner confirmed for Mr. Hornik that he has been Planning Director for a little over two years.

Mr. Zehner reviewed for Mr. Hornik the Change of Tenant/Change of Use Application process. Mr. Zehner confirmed that Deputy Planning Director Kelly Wyatt maintains the file of these applications.

Mr. Zehner confirmed for Mr. Hornik that Ms. Wyatt reviewed the file as well as email records and was unable to find an application for that address in question.

Mr. Zehner confirmed for Mr. Hornik that there was no record of the property being inspected by any town staff.

Mr. Zehner confirmed for Town Attorney Ben Gallop that recently the Town was given a copy of an application that Mr. Brindley supposedly turned into the Town. Ms. Wyatt reviewed her files as well as email records and could find no record of having received an application or having forwarded an application to Town Staff. Deputy Town Manager Andy Garman also searched his email records but did not find anything other than the email correspondence already submitted as part of the agenda packet.

Ed Snyder, Code Enforcement Officer for the Town was called to testify in front of the Board.

Mr. Snyder reviewed for Mr. Gallop his actions following his initial conversation with Tax Collector Linda Bittner. When Mr. Snyder arrived, the person in charge was not there. He obtained permission to walk around from one of the employees. He observed and took photos of laundry folding, storage, etc. Mr. Snyder went back to the office and reported what he had seen to Ms. Wyatt and Mr. Zehner. After receiving confirmation that there were no records on file for the business, Mr. Snyder, under Mr. Zehner's direction issued the Notice of Violation.

Mr. Snyder confirmed for Mr. Gallop that what he saw was consistent with Mr. Brindley's description of a laundry distribution facility.

Mr. Snyder confirmed for Mr. Gallop that he did not recall seeing anything that looked like office space in the building. Mr. Snyder also confirmed that he did not see any outdoor storage of equipment or materials.

Mr. Snyder confirmed for Mr. Hornik that he was employed with the Town in August of 2017 in the same capacity as he is now. Mr. Snyder confirmed that he had not and was unaware of any other Town Staff having inspected the subject property around that time.

Mr. Snyder confirmed for Mr. Hornik that the only function that was being performed at the property when he was there was a few employees folding laundry, putting them inside labeled plastic bags then placing them in bins. Mr. Snyder also saw storage of toilet tissue and beds. Mr. Snyder did not see any office functions being performed.

Mr. Snyder confirmed for Ms. Lowe that the unit had previously housed the ABC store and the Sears store.

Chair Suppler asked if the Town does any follow-up when someone enters into a new lease. Mr. Snyder explained that if the Town is made aware (through a change of use, etc.), Building Inspectors and Fire will go out and do a site visit.

Mr. Snyder confirmed for Mr. Hornik that he was not aware of Mr. Brindley having spoken to anyone at the Town other than through the aforementioned email correspondence.

Evidence presented by Applicant Mr. Hornik passed around copies of some documents for the Board to review. Mr. Hornik then called Applicant Douglas Brindley, owner of the subject business to testify in front of the Board.

Mr. Brindley gave a brief description of his business. Mr. Brindley confirmed for Mr. Hornik that they have occupied the space at the subject property since August of 2017. Mr. Brindley stated that they needed the property to manage both growing office needs and housekeeping and inspections operations. When he was searching for a space to fit his needs, realtor Jim Perry informed Mr. Brindley of the need to complete the Change of Tenant/Use Application with the Town of Nags Head.

Mr. Hornik called to the Board's attention the documents that he had distributed (Exhibit 1). Mr. Brindley confirmed that it was the Change of Tenant form which he stated he completed on August 21, 2017.

Mr. Brindley confirmed for Mr. Hornik that based on Mr. Garman's request (from the email dated August 21, 2017), Mr. Brindley took the drawing of the Floor Plan, which he had sketched, to Dare County Health for their approval. After he received his stamp of approval (August 23, 2017), he dropped off the stamped plan and change of tenant form at Town Hall.

Mr. Brindley testified that he dropped the documents off with a staff

person and then spent a few moments chatting with then Town Manager Cliff Ogburn before leaving.

Mr. Brindley did not recall receiving anything else from the Town. He did receive a visit from the Fire Department, and everything seemed fine.

Mr. Brindley confirmed that the original floor plan showed 12 offices, but they ended up only doing partitions for four offices as they did not hire as many real estate agents as originally intended.

Mr. Brindley confirmed for Mr. Hornik that they use the structure to package and deliver goods and linens to their rental houses; they then pick up the soiled linen and take them back to the property to launder them. Mr. Brindley confirmed that there are about eight employees and three managers working at the property. Mr. Brindley confirmed he has various types of delivery vehicles that when not in use are parked at the rear west side of the facility. Mr. Brindley also confirmed that there is no signage provided at this location as there is no need for it.

Mr. Brindley confirmed for Chair Suppler that the four offices are currently being occupied by his staff and have been since they moved in. Mr. Brindley noted that when the need for the additional agents onsite was no longer necessary, the space designated for the offices was used for other operations within the facility, including storage.

Mr. Brindley confirmed for Mr. Mascaro that he has no written documentation from the Fire Department with regards to their site visit.

Mr. Brindley confirmed for Mr. Hornik that they have purchased another property with the intent to relocate this facility to a new space, however, with the Covid-19 pandemic, those plans have been delayed. Mr. Brindley confirmed that they are on track to be able to relocate this operation by the end of the year.

Mr. Brindley confirmed for Town Attorney Ben Gallop that the offices shown on his floor plan were never built and there have never been any real estate agents at the facility. Mr. Brindley confirmed that the four offices that were built have walls and electricity but that he did not have a certificate of occupancy for the use of the space or for the offices.

Mr. Brindley confirmed for Mr. Gallop that that the existing offices are not being used as a contractor's office, professional office, or trade association office.

Mr. Brindley confirmed for Mr. Gallop that he did not recall the exact date that he dropped off the documents at Town Hall but it was either the same day or the day after he received his Health Department approval.

Recess The Board took a brief recess; the time was 10:32 AM. The Board reconvened at 10:40 AM.

Evidence presented by Applicant - Continued Ms. Wyatt confirmed for Mr. Mascaro that a Change of Tenant/Change of Use is not processed the same way as a permit; rather than be entered into the permitting system they come to Ms. Wyatt who distributes them as appropriate. Ms. Wyatt confirmed that in this case Staff would have considered this a change of use (for instance going from liquor store to offices) rather than a change of tenant (for instance office use to office use) and it would have triggered a building, fire and zoning review.

Ms. Wyatt confirmed for Board Attorney Jay Wheless that the review of these types of applications has not changed from 2017 to present day. Ms. Wyatt also confirmed that she generally advises the applicant via email or phone call once they have been approved.

Ms. Wyatt confirmed for Chair Suppler that she had searched both her paper as well as electronic files and she had no record of having received the documents that Mr. Brindley testified he had submitted.

Mr. Brindley confirmed for Mr. Gallop that he did not have record of receiving a follow-up email or telephone call from Ms. Wyatt or any other staff stating that his application had been processed.

There being no further questions, Mr. Hornik gave his closing remarks. Mr. Hornik noted that prior to October 2020 Mr. Brindley had no indication that there was any problem with the space and believed he had done everything that had been requested of him. Mr. Hornik reminded the Board that Mr. Brindley plans to relocate his operations to another facility and would request that if the Board votes to affirm the notice of violation, that Mr. Brindley be given a stay of enforcement and allowed to finish out the season with the agreement that he will be gone by the end of the year.

Mr. Gallop then gave his closing summary arguing that Staff was correct in issuing the Notice of Violation and that the appellant had not provided the necessary evidence to show otherwise.

The Board and the attorneys discussed whether they or Staff had the authority to grant a stay of enforcement and if they could ask the applicant to waive any rights to pursue legal challenges of the Board's decision in this matter.

Mr. Wheless reviewed all exhibits from Staff and the Applicant and asked that all the documents be accepted into evidence.

Chair Suppler admitted the evidence and then closed the Public Hearing.

After a brief discussion where most Board members agreed with Staff's

findings, Don Milbrath moved to uphold the Notice of Violation and affirmed all three of the noted violations. John Mascaro seconded the motion and the motion passed by unanimous vote.

The Board then discussed a possible remedy for the applicant. Chair Suppler stated she would be agreeable to granting a stay of enforcement. Mr. Milbrath stated he would be agreeable if the applicant was willing to waive any rights to pursue legal challenges of the Board's decision.

Mr. Hornik confirmed for Mr. Wheless that his client was willing to waive his rights of appeal.

Motion

After some further discussion, John Mascaro moved to affirm the Notice of Violation with the following modifications:

- A. A stay of enforcement of this decision until the earlier of December 31, 2021, or fifteen (15) calendar days after a certificate of occupancy has been issued for the Applicant's new laundry distribution facility that is under construction is granted.
- B. There shall be no expansion of the existing uses occurring at the Property.
- C. An annual Fire Inspection by the Town's Fire Marshall is to be permitted by the Applicant as soon as convenient.
- D. A building inspection by the Building Inspector shall be permitted by the Applicant to inspect work that has occurred without proper permits for safety purposes as soon as convenient.
- E. The Applicant will remedy any violations found by Fire and Building inspections.

Upon conclusion of the expiration of the stay of enforcement granted above, the Applicant shall immediately cease and desist use of the Property unless and until all necessary permits and approvals have been obtained for the use.

Don Milbrath seconded the motion and the motion passed by unanimous vote.

Order

The Board of Adjustment (the "Board") for the Town of Nags Head, North Carolina (the "Town"), pursuant to notice as required by the Town's Unified Development Ordinance (the "UDO"), having held a public hearing on March 11, 2021, attended by a quorum of members of the Board of Adjustment, to consider an appeal filed by Mr. Robert Hornik Jr. of the Brough Law Firm on behalf of Brindley Beach Vacations and Sales (the "Applicant") concerning the issuance of a Notice of Violation for occupying and utilizing a space located at 2210 S. Croatan Highway (the "Property"), in violation of the Town's Unified Development Ordinance. Attorney Robert Hornik Jr. appeared and

represented the Applicant. Attorney Benjamin M. Gallop appeared representing the Town and Attorney Jay Wheless appeared and represented the Board. Having reviewed the record materials and having heard the testimony of the Director of Planning & Development, the Code Compliance Officer, the Deputy Planning Director and Mr. Doug Brindley, and all of the arguments presented at the hearing, makes the following FINDINGS OF FACT and draws the following CONCLUSIONS which are supported by substantial, competent and relevant evidence in the record:

- A. The meeting was duly noticed as required by law. The Notice of Violation (No 981) being appealed was duly served upon Mrs. Gloria Hargett, the representative for the property owner, Satterfield Landing, LLC.
- B. On October 27, 2020, following up on a mention by Linda Bittner, Town of Nags Head Tax Collector, that she had noticed activity in a tenant space in the Satterfield Landing Shopping Center, Ed Snyder, Town of Nags Head Code Enforcement Officer, conducted an inspection of the Property and provided the photographs attached to the record as Exhibits A-1 thru A-6; Mr. Snyder determined that the tenant space was being occupied by the Applicant.
- C. Also, on October 27, 2020, Mr. Snyder discussed the photographs and his inspection with the Town's Deputy Town Manager Andy Garman, Director of Planning and Development Michael Zehner, and Deputy Planning Director Kelly Wyatt. Mr. Garman and Ms. Wyatt noted that in 2017, Doug Brindley owner of the Applicant, had inquired about occupying the space as an office. While Mr. Brindley had been provided with the Town's Change of Tenant/Use application form, there is no record of this application form being returned to the Town, and no records of inspections being performed, or approvals being granted.
- D. Also, on October 27, 2020, Mr. Zehner called Gloria Hargett, the representative for the property owner, who indicated that it was her understanding that the space was used for the storage and distribution of linens for rental homes.
- E. Further on October 27, 2020, Mr. Zehner emailed Mr. Brindley (See Exhibit B to the Board's agenda packet, also containing emails between Mr. Brindley and Mr. Garman from 2017 concerning the previous direction provided to Mr. Brindley referenced above) informing him that Staff had become "aware that a tenant space next to TJ Maxx was being actively used, and upon inspection by our Code Enforcement Officer..., it was determined that this space was being used/occupied by Brindley Beach Rentals," and that related to the prior communications from 2017 "it was anticipated that you were intended (sic) to use the space for an office. However, we have no record of a Change of Tenant/Use Application being submitted or issued by the Town, as requested by Andy Garman at the time."

Mr. Brindley responded to Mr. Zehner, indicating "That was our original plan. Then we needed to have this distribution of laundry. Is that a problem??"

Mr. Zehner responded that "pursuant to Section 4.10 of the UDO you cannot initiate the use of the property without necessary permits, Section 4.13 would require a certificate of compliance as a result of the permit for the change of use, and per Section 6.6 the use, which seems to be a Real Estate Rental Management Facility, would not be allowed based upon the C-2 zoning of the property."

Mr. Brindley responded that "This is not real estate management. All activities for management are done in other locations. This is managing a service."

Mr. Zehner responded, providing the definition of Real Estate Rental Management Facility, and noted that he "would agree that based upon the information available that this is not real estate management, but rather the managing of a service, which is consistent with the Real Estate Rental Management Facility use."

F. Subsequently, on October 29, 2021, a Notice of Violation - Warning Citation was issued by the Town to the property owner noting violations of Sections 4.10.1., 4.13.1., and 6.6. of the Town's Unified Development Ordinance (the Notice of Violation - Warning Citation is as contained in the materials filed by the Applicant).

G. On November 25, 2021 the subject appeal was filed.

H. Staff procedures with regard to the acceptance of the Change of Tenant/Use Application would have provided for the discovery of such an application had it been filed. After searching both hard copy and digital records the Town was unable to locate any evidence of the submission of a Change of Tenant/Use application by Mr. Brindley on behalf of the Applicant.

I. Upon inspection the use of the Property appeared to be a laundry distribution business. There does not appear to be a building contractors office, administrative offices, professional offices, or trade association office, i.e. the types of office spaces permitted within the Town of Nags Head C-2 General Commercial Zoning District. There are no outdoor storage areas.

J. An inspection of the Property discovered folding of laundry, packaging it and placing it in a bin, and storage of toilet tissue, beds and bedding, as seen in the photographs included in the record. There were no offices or any office like functions occurring during the inspection.

K. Mr. Doug Brindley is the owner of the Applicant, and the Applicant has occupied the tenant space in question since August of 2017. Mr. Brindley needed the Property to manage both growing office

needs and housekeeping and inspections operations. When he was searching for a space to fit his needs, realtor Jim Perry informed Mr. Brindley of the need to complete the Change of Tenant/Use Application with the Town of Nags Head. Mr. Brindley recollected communicating with Mr. Garman, Planning Director at that time, on the floor plan he had proposed and believed that as proposed it could be approved once he had received approval from Dare County Environmental Health for the septic adequacy per email dated August 21, 2017. Upon receiving approval from the Dare County Health Department, Mr. Brindley recollected dropping off the Change of Tenant/Use application along with the DCHD approved floor plan to the front desk of Town Hall. Mr. Brindley did not receive any communication from Town Staff beyond that, however, the Nags Head Fire Department did conduct an inspection of the facility shortly thereafter which again, led him to believe that everything was approved by the Town.

- L. The initial proposed floor plan and expected use of the Property included numerous additional real estate agents and expected that 12 office spaces would be provided within this tenant space, along with a laundry folding area and storage space. The need for those additional 12 real estate offices had diminished and they had not been constructed, but 4 offices had been constructed along the eastern wall of the unit for the housekeeping and laundry manager, the inspections manager, and an assistant. Various types of delivery vehicles are used in this operation and there is no signage provided at this location as there is no need for it. The Applicant could not explain why the Town does not have in its records a copy of the information that Mr. Brindley recalled personally delivering to the Town. The Applicant has purchased another property with the intent to relocate this facility to a new space, however, with the Covid-19 pandemic, those plans had been delayed, but the Applicant is currently on track to be able to relocate this operation by the end of 2021.
- M. When the need for the additional agents onsite was no longer necessary, the space designated for offices became consumed by other operations within the facility. The Applicant did not have any documentation or record of the Fire Department conducting an inspection, such as something denoting compliance, or areas to be addressed.
- N. The office spaces shown on the DCHD approved floor plan had not been constructed. The Applicant admitted that 4 offices along the eastern wall previously mentioned, do have walls and electricity to them, but the Applicant is unaware if any building permits had been acquired to complete this interior remodel. The Applicant does not have a Certificate of Occupancy/Compliance for the use of the tenant space or the interior renovations for the 4 office spaces along the eastern wall of the unit. The Applicant admits that the existing office spaces were utilized by employees of the existing operation: housekeeping, laundry, and inspections and furthermore that these offices were not being used as a

contractor's office, professional office, or trade association office. Unlike the Applicant's office where it conducts the real estate vacation and sales portion of its business, the Applicant admitted that Mr. Brindley he did have an office at the Property and that the Property did not have exterior signage like his real estate vacation and sales office does to inform the public of the services being offered. Other than a recollection of receiving DCHD approval and providing the Town of Nags Head office with the Change of Tenant/Use application, the Applicant could not recollect the exact date that he provided them.

- O. The Town searched both digital and hard copy records back to 2015 and found no Change of Tenant/Use Application for Mr. Brindley.
- P. The Applicant agrees to waive any rights to pursue legal challenges of the Board's decision in this matter, including, but not limited to, appeals, declaratory judgments or other lawsuits, if the Board will grant the Applicant a stay of enforcement of this decision until the earlier of December 31, 2021 or fifteen (15) calendar days after a certificate of occupancy has been issued for the Applicant's new laundry distribution facility that is under construction. The Applicant further agrees that if the Board grants such a stay of enforcement as part of its decision there shall be no expansion of the existing uses occurring at the Property; an annual Fire Inspection is to be permitted by the Applicant as soon as convenient; and a building inspection by the Building Inspector shall be permitted by the Applicant to inspect work that has occurred without proper permits for safety purposes. The Applicant will remedy any violations found by such inspections.

Based upon the findings of fact stated above and other supporting evidence in the record, the Board CONCLUDES that the Applicant is occupying and using the Property in violation of the following provisions of the Town's Unified Development Ordinance:

- 1. Section 4.10.1. The use of the Property has been initiated without having obtained necessary permits.
- 2. Section 4.13.1. The Property is being used and occupied, and has been subject to a change of use, without a certificate of compliance having been issued.
- 3. Section 6.6. The use being conducted on the Property constitutes a Real Estate Rental Management Facility as defined by Appendix A, Definitions of the UDO, and is a use which is not permitted in the C-2 zoning district, which is the current zoning of the Property.

THEREFORE, IT IS ORDERED that the decision of the Code Compliance Officer as set forth in the appealed October 29, 2020, Notice of Violation is hereby AFFIRMED with the following modification:

- F. A stay of enforcement of this decision until the earlier of December 31, 2021, or fifteen (15) calendar days after a certificate of occupancy has been issued for the Applicant's new laundry distribution facility that is under construction is hereby GRANTED.
- G. There shall be no expansion of the existing uses occurring at the Property.
- H. An annual Fire Inspection by the Town's Fire Marshall is to be permitted by the Applicant as soon as convenient.
- I. A building inspection by the Building Inspector shall be permitted by the Applicant to inspect work that has occurred without proper permits for safety purposes as soon as convenient.
- J. The Applicant will remedy any violations found by Fire and Building inspections.
- K. Upon conclusion of the expiration of the stay of enforcement granted above, the Applicant shall immediately cease and desist use of the Property unless and until all necessary permits and approvals have been obtained for the use.

Ordered this 11th day of March 2021.

Adjourn

There being no further business to discuss, the meeting adjourned at 11:25 AM.

Respectfully Submitted,
Lily Campos Nieberding

