

**Town of Nags Head
Board of Adjustment**

June 9, 2022

The Board of Adjustment of the Town of Nags Head met in regular session Thursday, June 9, 2022 in the Board Room, Nags Head Municipal Complex, Nags Head, North Carolina.

Members Present Margaret Suppler, Bobby Gentry, Alice Coffey, Tina Adderholdt, Judy Burnette

Others Present Kelly Wyatt, Jay Wheless, Kate Jones, Margaux Kerr, Lily Nieberding

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

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

Variance request submitted by property owner John Robert Mitchell III from the requirements of Section 8.2.1, Dimensional Requirements within the R-2, Medium Density Zoning District, of the Unified Development Ordinance for the purpose of constructing a principal and accessory structure.

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

Evidence presented by Town Planning Director Kelly Wyatt explained that John Robert Mitchell III, property owner, had submitted a variance request from the requirements of Section 8.2.1 of the UDO, Dimensional Requirements, in order to facilitate the development of a single-family dwelling with an accessory structure on his property located at 119 W. Waterside Lane. This property is located within the Nags Head Pond Subdivision and is zoned R-2, Medium Density Residential.

Ms. Wyatt presented a proposed site plan and explained that the property in question does meet minimum lot area and the minimum lot width. The property also meets the front and side yard setbacks, however what the applicant currently does not meet is the rear yard setback.

Variances are being sought from the following sections of the Unified Development Ordinance (UDO):

- 1) Section 8.2.1 Dimensional Requirements. Section 8.2.1 of the UDO states that the minimum side yard setback shall be 10 feet.

The definition of "Yard, Side" is included within Appendix A of the Unified Development and means a yard extending from the rear line of the required front yard to the rear yard. The width of a required side yard shall be measured in such a manner that the yard established is a

strip of the minimum width required by district regulations with its inner edge parallel with the side lot line.

The applicant has illustrated compliance with the required 10-foot side yard setback in all three of the proposed build surveys that were attached to his application. Based on this information, no variance is being sought from the required 10-foot side yard setback, however, the applicant is requesting the Board of Adjustment consider an increased side yard setback from 10 feet to 15 feet as shown on "Proposed Setbacks, Drawing# 1", as an offset to a reduced rear setback.

Staff would note that the building setbacks are the minimum required by the district designation. Should anyone developing a property desire to increase the minimum required setback along any property boundary that would certainly be acceptable, however we would not consider this as an opportunity to trade off, offset or reduce another setback in return.

2) Rear Yard. Section 8.2.1 of the UDO states that the minimum rear yard setback shall be 20% of the lot depth not to exceed 30 feet.

The applicant is requesting consideration be given to varying the rear yard setback in order to increase the allowable building envelope for construction of a 54' x 52' single-family dwelling including porches and a 32' x 32' accessory structure/garage with 2nd floor habitable area.

In this scenario, the rear yard setback shall not exceed 30 ft. based upon Section 8.2.1.

The applicant is requesting that the Board of Adjustment consider the calculation of the rear yard setback in such a way as to result in a reduced setback of 22.6 feet. Further, the applicant is requesting an additional reduction of 5 feet from the rear yard setback due to his willingness to increase the 10-foot side yard setback to 15 feet. The method by which the applicant has come to this determination is detailed in the application responses for Question #5 and #7e.

Staff maintains a file of "Setback Interpretations", outlining how setbacks have been consistently determined for unusual and irregular shaped lots over time.

Staff attachments "B" and "C" are surveys from this folder which provide examples of how setbacks have historically been calculated. Based upon this method, staff would submit that the minimum 30-foot rear yard is the correct application. Furthermore, staff would note that it has not been a practice to acknowledge the increase of one setback as a justification to decrease another setback.

In review of the variance request, it would seem that the applicant is essentially seeking one of the following as a result of this request:

- Reduction of the 30-foot rear yard setback to 17.6 feet in order to construct the desired principal and accessory structure. This would result in a variance of 12.4 feet from the minimum 30-foot rear yard

requirements, or

- Encroachment of the proposed porch 12.4 feet into the 30-foot rear yard setback.

It appears that either approach to the variance would accomplish the applicant's desired outcome. However, Section 3.10.4 of the UDO, Variances, states that a variance that is granted shall be the minimum variance that will resolve the unnecessary hardship resulting from the strict application of the UDO to the land, building, or structure. Staff is of the opinion that the applicant has not demonstrated that the requested setback reduction is the minimum necessary.

The property owner has provided a completed variance application along with numerous attachments including detailed responses to application, utility and drainage easement information, Nags Head Pond Subdivision plat information deed information, proposed structure elevations and floorplans, lot information and 3 surveys with hand drawn, scaled improvements shown.

Section 3.10.1, Standards for Granting a Variance, of the Unified Development Ordinance, sets forth the standards by which the Board of Adjustment must review and decide upon variance cases. A variance shall be authorized only when affirmative findings to all the requirements set out in the section are made by the Board. Included below are the findings and recommendations of Staff in review of this variance request:

3.10.1. Standards for Granting a Variance.

When unnecessary hardships would result from carrying out the strict letter of this UDO, the Board of Adjustment shall vary any of the provisions of the UDO upon a showing of all of the following:

3.10.1.1. 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 are of the opinion that the applicant has not provided enough information to determine whether a hardship exists related to the subject provisions. Additionally, staff are of the opinion that the inability to construct the desired principal and accessory structure in the desired configuration, versus the ability to construct a home consistent with the district setbacks, is not an inherent unnecessary hardship.

3.10.1.2. 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. A variance may be granted when necessary and appropriate to make reasonable accommodation under the Federal Fair Housing Act for a person with a

disability.

As noted above, Staff is of the opinion that a hardship has not been identified. While the shape of the applicant's property is irregular, the applicant has not demonstrated that development of the site is not possible with complying with these requirements.

3.10.1.3. 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 are of the opinion that sufficient information has not been provided as no hardship has been identified. Furthermore, it appears to be the applicant's desire to construct a principal dwelling and accessory structure of a specific size that has led to the requested variance.

3.10.1.4. 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.

Without additional information, Staff is unable to determine whether the requested variance is consistent with the spirit, purpose, and intent of the ordinance. While the applicant is seeking consideration of a variance that would result in the reduction of the rear yard setback, the applicant has not demonstrated or provided information detailing the hardship as to why the proposed structures could not be shifted, reoriented, or reduced in size to meet the required setbacks.

Based upon the above analysis, staff are of the opinion that the strict enforcement of the Unified Development Ordinance as it pertains to the development of 119 W. Waterside Lane, with a single-family dwelling and accessory structure, does not create practical difficulties or unnecessary hardship for the applicant and for this site, as none has been identified or demonstrated.

Chair Supplier asked how Staff determined the midpoint for the variance request. Due to the irregular shape of the lot, it was clarified that the midpoint was taken from the rear corner of the property. Ms. Wyatt explained that the applicant proposed using a different midpoint location, which would result in a rear yard setback of 22.6 feet, as shown in the application. The applicant also indicated a desire to maintain a stand of mature vegetation and requested that the side yard setback be reduced from 10 feet to 15 feet on one side, with a corresponding adjustment on the other side. This would allow the proposed structure to fit within the required setbacks.

Ms. Wyatt confirmed for the Board that the location of the septic has been approved by Dare County Septic Health.

Ms. Wyatt was uncertain if the garage would be attached or detached. Ms. Wyatt confirmed for Chair Supplier that if there was no habitable space above the garage, the property would be compliant. The fact

that there's habitable space above the accessory structure is what is driving the need to meet the principal structure setbacks.

Ms. Wyatt confirmed for Chair Supplier that if a space is conditioned in any way, then it's considered habitable living space.

Ms. Wyatt confirmed for Chair Supplier that this is a large lot so she does believe lot coverage would be an issue, but she did not know for certain as no lot coverage calculations had been provided.

Ms. Wyatt confirmed for Board Attorney Jay Wheless that the applicant's proposal does not endanger other structures.

Evidence presented by
Applicant

John Robert Mitchell III, the property owner at 119 W Waterside Lane, addressed the Board. He began by explaining that he was requesting a variance for the rear yard setback, as the current setback is set at the maximum of 30 feet, which he believes is an incorrect determination. He also clarified that the proposed rear setback of 22.6 feet, as submitted in his application, is closer to the correct measurement but still not accurate. According to the Unified Development Ordinance (UDO), the lot depth and minimum rear yard depth should be calculated based on specific definitions, and by these calculations, the correct rear setback for his lot should be 20.61 feet. He explained that this measurement was taken in 10-foot increments along the rear property line and was verified by a surveyor. He offered to submit additional copies of the survey for the Board's review.

Mr. Mitchell submitted into evidence a transect drawing done by a surveyor for the Board's review.

Mr. Mitchell continued by explaining the calculation for the correct rear yard setback. He detailed how the lot depth was measured in 10-foot increments along the property line, which resulted in an average lot depth of 103.04 feet. Using the UDO's formula, 20% of the lot depth was calculated, resulting in a rear setback of 20.61 feet. He acknowledged that due to the irregular shape of the lot, it was difficult to calculate the exact depth, and further, smaller measurements would likely marginally reduce the setback.

Mr. Mitchell also addressed the Town's interpretation of setbacks for irregular lots, pointing out that the staff's examples did not accurately represent his lot's shape. He emphasized that using only three lot depths to calculate the average for his lot was not in line with the UDO's definition and resulted in an inaccurate setback.

As part of his variance request, Mr. Mitchell sought an additional 5-foot reduction in the rear setback, proposing a 15.61-foot setback. He clarified that the original request for a 17-foot setback was based on a preliminary calculation and now, with more accurate measurements, he was requesting a more refined setback of 15.61 feet.

Mr. Mitchell confirmed for Chair Supplier that his ideal request is to reduce the rear yard setback to 15.61 feet by reallocating 5 feet from

the right-side setback, effectively exchanging side yard space for rear yard space. However, he acknowledged that if the Board maintained its current interpretation, he would accept a rear setback of 20.61 feet without adjusting the side yard.

He explained that even with a 20.61-foot setback, he could shift the structures north and east, preserving as much of the existing vegetative buffer as possible between his property and nearby residences in Nags Head Acres. Mr. Mitchell noted that he did not foresee objections from neighboring commercial properties, which include a laser tag facility and a Jersey Mike's, as their drain field is located behind their building. Ultimately, he believed the primary impact of any decision would be on his own property rather than surrounding businesses.

Johny Hallow, Town Attorney, asked Mr. Mitchell if he had consulted any professionals, such as builders or architects, to explore whether adjustments to the shape or placement of his structure could allow it to fit within the town's calculated setbacks.

Mr. Mitchell responded that he had not sought professional input but emphasized that the proposed structure's size and shape were intentional. While he acknowledged that modifying the footprint could make it fit, he maintained that reducing the size was not his preferred solution, noting that any structure could technically be made to fit.

Staff and the Board discussed whether the town had correctly interpreted the rear yard setback requirement for Mr. Mitchell's property. Ms. Wyatt acknowledged that the ordinance language is vague and open to interpretation. Historically, the town has measured lot depth using only two or three points, whereas Mr. Mitchell took multiple measurements to calculate an average, which suggests a different setback calculation.

Chair Supper asked for confirmation that the main issue was determining the correct rear yard setback rather than the size of the house Mr. Mitchell wants to build. Ms. Wyatt agreed but noted that if Mr. Mitchell is requesting an additional reduction in the setback (beyond what the recalculated number allows), he would need to file a separate variance request and demonstrate a "hardship" to justify the reduction.

Ms. Wyatt confirmed for Mr. Wheelless that the new survey was a more accurate interpretation of the UDO's language.

Mr. Mitchell confirmed for Ms. Adderholdt that the plans she was looking at were the original plans drawn (with garage shown on the other side) to give the Board an idea of what he wanted to build as far as size.

Mr. Mitchell noted for the Board that he believed that his variance application included both the correction to the rear set back and then the potential further reduction of the rear set back trade off that he

had discussed previously.

Ms. Wyatt stated that after reviewing the survey she was comfortable with the 20.6 rear yard setback, but the applicant has not shown a hardship for a reduction beyond the 20.6.

Ms. Burnette noted that the applicant needs to have a survey with the appropriate house that Mr. Mitchell intends to build, so that the Board can actually see the location and where it's going to go.

Chair Suppler agreed with Ms. Burnette and acknowledged Mr. Mitchell's interpretation as correct but clarified that the Board does not have the authority to approve his request to trade setback space.

Chair Suppler suggested that if Mr. Mitchell still needed the additional setback, he would need to get an updated site plan drawn up and come back to the Board showing a hardship.

Mr. Wheless agreed noting that once the applicant has a new site plan with the correct setbacks applied, he might not even need a variance.

Mr. Mitchell noted that his construction will happen in two phases, with the second phase being the main home. While he initially had concerns about the aesthetics of the clipped corner on the porch, he stated that it might work out fine depending on how the stairs are designed.

Mr. Mitchell acknowledged that it wasn't particularly a hardship reiterating that his main goal was to shift the structures north and east while maintaining as much of the tree buffer along the south property line as possible. He also mentioned that he had a site plan drawn by the surveyor, but it currently reflects the original 30-foot setback. However, the surveyor can likely adjust it in their software to align the structure with the updated setback.

There being no further questions for Mr. Mitchell, the Board agreed to hear from the other witnesses before making a final decision.

Kenneth Morgan, 122 Waterside Ln, expressed support for granting the additional 5-foot setback. He emphasized that preserving more vegetation on the south side of the property would help maintain privacy and aesthetics for surrounding homes, particularly by preventing an open view into the next neighborhood. He noted that the existing vegetation along the rear property line already serves as a natural buffer, and retaining additional trees on the south side would be beneficial for neighboring properties.

Charles Roberts, 124 Waterside Ln, raised concerns about the variance request. He argued that no hardship had been demonstrated, as the house design could potentially be modified to fit within the existing setbacks. He also questioned the methodology used to calculate the rear yard setback, suggesting an alternative approach based on the midpoint of the curved property line. He stressed the importance of consistency in setback determinations to avoid setting problematic

precedents for future cases.

Chris Hardin, 2105 S Bridge Ln, his property is directly behind Mr. Mitchell's lot. He would like the Board to grant the variance for the additional 5-foot setback in order to give him more of a buffer. He wants the applicant to keep as much of the vegetation as possible as he believes it would help with existing Stormwater issues.

There being no further testimony the Board closed the public meeting. Mr. Wheless reviewed all the documents provided and Chair Supplier accepted everything into evidence including the updated survey.

Motion

Bobby Gentry moved to dismiss the variance request for lack of jurisdiction based on the newly interpreted lessened setback burden. Judy Burnette seconded. The Board requested that Staff ask the BOC to revisit the way that a midpoint is calculated for irregular lots.

Order

The Board of Adjustment of the Town of Nags Head (the "Board") held a public hearing on June 9, 2022, to consider a variance application submitted by property owner, John Robert Mitchell III (the "Owner") seeking to vary the requirements of Section 8.2.1, Dimensional Requirements, Minimum Rear Yard Depth, of the Unified Development Ordinance (the "UDO") as it pertains to their property located at 119 W. Waterside Lane, Nags Head. The Board, having heard all of the evidence and arguments presented at the hearing, makes the following

FINDINGS OF FACT:

1. The applicant, John Robert Mitchell III, is the owner of real property located at 119 W. Waterside Lane in the Town of Nags Head, within the R-2, Medium Density Residential Zoning District.
2. The applicant requested a variance from Section 8.2.1 of the Unified Development Ordinance (UDO) related to the minimum rear yard setback, seeking to reduce the required 30-foot setback to 15.61 feet, with an alternative request for a reduction to 20.61 feet based on a revised calculation of lot depth.
3. The Town's UDO requires that the minimum rear yard setback be 20% of the lot depth, not to exceed 30 feet. Staff initially determined the setback to be 30 feet based on longstanding interpretation methods.
4. During the hearing, the applicant presented an updated transect survey and argued for a more precise average lot depth based on multiple measurements taken at 10-foot intervals, resulting in a calculated setback of 20.61 feet.

5. Town Planning Staff reviewed the updated survey and agreed that, based on the applicant's interpretation of the UDO language, the appropriate minimum rear yard setback was 20.61 feet.
6. The applicant also proposed a further reduction to 15.61 feet by increasing the side yard setback on one side of the property from 10 to 15 feet, but the Board determined it lacked the authority to approve a "trade-off" between setbacks.
7. Multiple members of the public addressed the Board in support of or opposition to the requested variance. Concerns focused on preservation of vegetation, privacy, consistency of application, and potential for precedent.
8. The applicant acknowledged that the primary issue was determining the correct rear yard setback, and that he had not demonstrated a hardship justifying an additional reduction below the recalculated 20.61 feet.
9. Based on the new setback interpretation, the applicant's project may proceed without a variance, or with a site plan revision, and thus, no jurisdiction existed for the Board to act on a hardship variance.

NOW, THEREFORE, based on the foregoing findings of fact and the evidence presented at the June 9, 2022 hearing, the Town of Nags Head Board of Adjustment does hereby:

1. **DISMISS** the variance request submitted by John Robert Mitchell III for lack of jurisdiction, as the applicant no longer requires a variance due to a revised and accepted interpretation of the rear yard setback requirement.
2. **RECOMMEND** that Town Staff and the Board of Commissioners revisit and clarify the methodology for determining lot depth and rear yard setbacks for irregularly shaped lots to promote consistency and transparency in future development reviews.

Adjourn

There being no further business to discuss, the meeting adjourned at 10:16 AM.

Respectfully Submitted,
Lily Campos Nieberding