

**TOWN OF DUCK
BOARD OF ADJUSTMENT MEETING
MONDAY, NOVEMBER 22, 2021
MINUTES**

The Board of Adjustment for the Town of Duck convened at the Paul F. Keller Meeting Hall at 3:00 p.m. on Monday, November 22, 2021.

BOARD OF ADJUSTMENT MEMBERS PRESENT: Chair Olin Finch, Tom O'Brien, Carol Powell, Ed Sadler, Robert Wetzel, Alternate David Flowers, and Alternate John Pucciano. Staff present: Director of Community Development Joseph Heard, Attorney Ben Gallop, Board of Adjustment Clerk Sandy Cross, and Deputy Town Clerk Kay Nickens.

MEMBERS ABSENT: None.

OTHERS PRESENT: Andy Deel, Deel Engineering.

CALL TO ORDER

Chair Finch called the meeting to order at 3:00 p.m.

ELECTION OF OFFICERS

Chair Finch called for elections for Chair and Vice Chair. Member O'Brien nominated Olin Finch for Chair of the Board. Member Sadler seconded the motion. Member Wetzel moved to close nominations. Member Pucciano seconded the motion. Chair Finch called for a vote; all members voted in favor. Motion carried 5-0.

Member Powell nominated Member O'Brien for Vice Chair. Member Wetzel seconded the motion. With no other nominations, Chair Finch closed the nomination and called for a vote. All members voted in favor. Motion carried 5-0.

OVERVIEW OF VARIANCE DECISION- MAKING PROCESS

Attorney Ben Gallop was recognized to speak. Attorney Gallop noted that the public hearing is a quasi-judicial one which is sort of like a court, but with lesser rules of evidence. He reminded the Board that they will be acting on the competent sworn testimony that has to be shown to meet the standards of a variance to enact it. He noted that there are six standards and each one must be passed with a 4/5 vote. If any of the standards fail, then the variance cannot be granted. He stated that the Board can place reasonable conditions when granting the variance. He stated that after Director Heard and the applicant give their presentations, the Board will have a chance to ask questions. He added that Director Heard and the applicants can ask questions of each other as well. He stated that if any members of the public wish to speak to the application, they will have to be sworn in and can speak after the applicant's presentation. He stated that after that, there may be a brief summary by Director Heard and/or the applicant, the public hearing will be closed, and the Board will deliberate on the six standards and decide to grant or deny the variance request.

Chair Finch questioned who will be representing the Town Staff. Director Heard stated that he would be representing staff and noted that engineer Andy Deel would be representing the applicants.

Chair Finch pointed out that he was the contractor of record when the house was originally constructed and the as-built survey from his company's involvement reflects compliance with Dare County codes. Chair Finch noted that he does not know the current owners but wanted to bring his past involvement with the property to the attention to the Board in event that any member has an issue with him being part of the vote. Attorney Ben Gallop questioned if Town Staff has an issue with a conflict of interest. Director Heard stated that staff does not have any objections as there is no direct financial benefit involved for Chair Finch. Attorney Ben Gallop asked Mr. Deel if he had any objections to which Mr. Deel said he also did not. Chair Finch then stated that he has not been approached about this project nor does he have any knowledge of potential involvement going forward. Attorney Ben Gallop clarified that it has been 10-25 years since the house was constructed and Mr. Finch can participate in the discussion and vote since there are no objections.

Chair Finch then asked the Board if any other member need to be recused themselves for any reason. No member had any ties to the project that would need to be disclosed. Alternate Flowers and Alternate Pucciano moved to the audience as all regular members were present and voting.

PUBLIC HEARING

a. Variance BOV-2021-001: An application submitted by property owners Turtle Cove, LLC for two (2) variances in order to replace an existing swimming pool, hot tub, and pool deck in the same, nonconforming location at 158 Ocean Way:

(1) Variance of 18.7 feet to permit a setback of 6.3 feet from the front property line. Town Code Section 156.030(D)(3) requires a minimum setback of 25 feet from the front property line.

(2) Variance of 6.3 feet to permit a setback of 3.7 feet from the eastern side property line. Town Code Section 156.030(D)(4) requires a minimum setback of 10 feet from side property lines.

Notary Kay Nickens proceeded to swear in the applicants and staff for the public hearing.

The following persons were sworn to provide testimony during the hearing: Joe Heard and Andy Deel.

Director Heard pointed out that the public hearing had been properly advertised in the Coastland Times and notices mailed to the applicant, all adjoining property owners, and the Ocean Dunes neighborhood association. Notices were also posted physically at Town Hall as well as on the Town's website.

Director Heard gave an overview of the property detailing that 158 Ocean Way is an oceanfront property zoned Single- Family Residential (RS-1) located in the Ocean Dunes neighborhood. According to Dare County tax records, the subject property is approximately 14,000 square feet (0.32 acre) in size, making it a nonconforming lot less than the current minimum lot size of 15,000 square feet. The property has an oblong shape approximately 90 feet in width at the road, widening to 150 feet at the rear, and 100 feet in depth. In addition, the property contains a narrow strip approximately twelve feet (12') in width connecting the main body of the lot

eastward to the beach. The subject property presently contains an eight-bedroom, 4,182 square foot single-family residence that was constructed in 2002 under the jurisdiction and standards of Dare County, making this property a legal nonconforming lot and is grandfathered as a nonconfirming lot. The existing improvements are in the same locations as when they were constructed in 2002. The property was purchased by the applicants in 2010. Director Heard summarized the adjoining properties and the non-conformities that exist within the neighboring properties.

Director Heard quoted Subsection 156.030(D) from the Town Code stating that the Town requires a minimum setback from the front property line of 25 feet and a 10-foot setback from side property line. The property owners seek a variance from these standards to allow for a new swimming pool, hot tub, and pool deck to be constructed within the footprint of the existing non-confirming improvements on the property. The existing location of the swimming pool, hot tub, and pool deck is 6.3 feet from the front property line (encroaching 18.7 feet into the required 25 foot front setback) and 3.7 feet from the eastern side property line (encroaching 6.3 feet into the required 10' side setback). Director Heard clarified that the applicant is not requesting to go beyond the boundaries of what already exists on that property. They simply want to remove the aging pool and pool deck and replace with new facilities in the same location.

Director Heard stated that the reason a variance is required is due to Town standards for nonconforming structures in Section 156.073, in which a nonconforming structure removed or destroyed by more than 50% of its value cannot be reconstructed unless in compliance with current development standards.

Director Heard explained the first criterion for a variance is that unnecessary hardship would result from the strict application of the ordinance. Director Heard pointed out the Town setback requirements and that the property owner is seeking a variance from these setback standards to allow a new swimming pool, hot tub, and pool deck to be constructed in the same footprint as the existing, nonconforming improvements. Director Heard stated that the applicant conducted a study and report by engineer Joe Anlauf. The study and report found that it is infeasible to relocate the septic field to accommodate relocation of the swimming pool and pool deck. Therefore, the only location available on the property is in the current location. If the Town is to enforce the setback standards as written would push the location nearly 19 feet further to the north, essentially eliminating any opportunity to reconstruct the swimming pool and pool deck. Staff found that it would be a substantial hardship on the property owner to comply with the Town's current setback standards, as it would result in the loss of a swimming pool and associated pool deck.

Director Heard stated that the second criterion for granting a variance is that the hardship results from conditions that are peculiar to the subject property, such as location, size, or topography. He noted that the property is nonconforming because of its small size, shape, and the configuration of the property lines. The existing location of the residence, swimming pool, pool deck and septic system are unique characteristics of the subject property and contribute to the difficulty of relocating the pool and pool deck to a conforming location. There are other properties in the surrounding area that contain similar physical characteristics and existing nonconforming structures, but none have the combination of circumstances faced by the subject property. It is staff's opinion that the subject property has unique conditions peculiar to the

property and that such conditions contribute to the hardship in relocating the proposed improvements.

Director Heard stated the third criterion for granting a variance is that the hardship did not result from actions taken by the applicant or the property owner. The current owner purchased the property eight years after the property was built per Dare County standards. Dare County officials approved the project and issued a Certificate of Occupancy in 2002. The current nonconformities have existed since the property was built. It is staff's opinion that the hardship relating to the existing locations of the residence, swimming pool, pool deck, and septic system have not resulted from actions of the applicant or current property owners.

Director Heard continued with the fourth criterion granting a variance is that the requested variance is consistent with the spirit, purpose, and intent of the regulation. Director Heard explained common reasons why setback standards are adopted including fire safety, allowing light, and preserving privacy. The proposed swimming pool and pool deck pose no issue to fire safety. Additionally, the measurements taken between the property in question and neighboring properties shows substantial separation between the individual properties, posing no threat to fire safety. The proposed pool and pool deck are ground level and not elevated structures meaning they will not impact the availability of light to adjoining properties. The improvements are going back into the same place where they have existed for 20 years, meaning there would be no negative impact to privacy to surrounding properties. It is staff's opinion that the proposed project and requested variance comply with the purpose and intent of the Town's minimum setback standards.

Director Heard continued with the fifth criterion is that the variance granted is the minimum variance that will make possible the reasonable use of the land, building, or structure. An argument could be made for the construction of a smaller pool or pool deck however the dimensions of the proposed swimming pool and pool deck are consistent with the dimensions of the existing improvements. However, he noted that the property owner is not seeking to expand the size of the pool and deck. It is staff's opinion that the requested variance is a reasonable request and likely close to the minimum possible to accommodate the proposed improvements.

Director Heard noted the sixth criterion is that granting the variance will be in harmony with the general purpose and intent of the Zoning Ordinance and will not be injurious to the neighborhood or otherwise detrimental to the public welfare. The proposed improvements are consistent with the existing swimming pool, hot tub, and pool deck. By placing the swimming pool, hot tub, and pool deck within the existing footprint, the property owner will be minimizing any change or impacts to the surrounding properties. The property will look much like it has in the past. It is staff's opinion that granting the variance will not negatively impact the neighboring properties or be detrimental to the public welfare.

Director Heard stated that it is staff's opinion that the applicants have satisfied the six criteria for obtaining of a variance. As all the findings have been met in staff's evaluation of the requested variance, staff recommends approval of this variance application.

Chair Finch asked Mr. Deel if he had any questions for the Board or Director Heard, to which Mr. Deel said he did not.

Chair Finch questioned the dimensions on the proposed pool and if the pool dimensions were being provided in consideration to the variance. Director Heard explained that the pool dimensions are not relevant to the consideration of the variance as the variance is being asked from the edge of the decking, not the pool itself. Chair Finch asked if there are size and shape restrictions for the pool. Director Heard stated there are not.

Mr. Deel was recognized to speak. He stated that the owner/applicant resides in Texas, which is why he is presenting before the Board on the owner's behalf. He clarified that he did not describe the specific swimming pool dimensions within the footprint because it will not be as the same existing pool footprint. The variance request is based on the broader pool decking, which will be consistent with the existing footprint. Mr. Deel clarified that the purpose of requesting a variance is due to the deteriorating nature of the existing pool which has passed the point of being repaired and approached the point of needing replacement. Mr. Deel explained how relocation of the swimming pool and decking would not work on the property due to pool and wastewater system setbacks.

Attorney Ben Gallop stated that it is typical for a Board of Adjustment to go through each standard and vote on them individually. However, since staff has provided a draft order, it would be acceptable for a motion to be made to adopt the order, findings, and conclusions as a result therein versus voting on each standard as previously noted.

Chair Finch called for any other witnesses before concluding the discussion. Vice Chair Sadler stated that this case was very well-explained and thought it would be cruel to not approve the variance because it is a rental home, and the rental income would go down substantially without a pool. Vice Chair Sadler moved to adopt the draft order as written. Member Powell seconded. Chair Finch called for a vote in which all members voted in favor. Motion carried 5-0.

Member Powell commented that it was a pleasure to listen to such a reasonable request and it was a very fair decision made by the board.

APPROVAL OF MINUTES

Chair Finch opened the approval of minutes from the February 14, 2019 meeting

Member Powell moved to approve the minutes as presented. Member O'Brien seconded.

Motion carried 5-0.

BOARD COMMENTS

Member Wetzel agreed that there were no other reasonable circumstances but questioned if this was the only way to resolving a variance. Director Heard stated that that was correct. Attorney Ben Gallop added that there would be an option to pursue a text amendment changing either the nonconformity provision or minimum setback standards. Member Wetzel asked if the Board of Adjustment is the only organization in the Town's structure that can approve a variance. Attorney Ben Gallop said that was correct.

Director Heard stated that this was a common problem faced with swimming pool permits. In many cases, property owners have been able to relocate a septic system to allow room for a pool, leading to the applicant having a study completed by engineer Joe Anlauf. This scenario did not allow for relocation of the improvements, which is why variance procedures are in place.

Member O'Brien stated that the presentation was well done. Member Powell stated that the packet was well compiled.

ADJOURNMENT

Member Finch adjourned the meeting. There was no second or vote.

The time was 3:57 p.m.

Approved: _____
/s/ Secretary