

July 15, 2021

Incorporated Village of Westhampton Beach held its Board of Zoning Appeals meeting on Thursday, July 15, 2021, at 5:00 p.m. in the Municipal Building, located at 165 Mill Road, Westhampton Beach, New York.

PRESENT: Gerard Piering, Chairman
Jim Badzik
Joe Musnicki
John Wittschen
Ellen Cea

Anthony C. Pasca, Esq., Village Attorney
Brad Hammond, Building & Zoning Administrator

Maeghan Mackie, Building Permits Examiner / Board Secretary

DECISIONS:

1. Brian & Blair Lichter, 371 Dune Road (905-018-02-001.03) Applicant requests variances from §74-5 C(2) to construct of a non-movable structure (dwelling) within the Coastal Erosion Hazard Area where specifically prohibited, from §197-8 D for a proposed side yard setback of 15.1 feet where the minimum required is 20 feet, also from §197-8 D for a proposed combined side yard setback of 42.3 feet where the minimum required is 50 feet, also from §197-8 D for a proposed rear yard setback to the crest of the dune of 40.7 feet where the minimum required is 75 feet, from §197-35 A for a proposed accessory attached deck/catwalk located in the side yard where specifically prohibited, from §197-35 C for a proposed rear deck setback to side property line of 15.2 feet where the minimum required is 20 feet, also from §197-35 C for a proposed deck setback to the crest of the dune of 13.1 feet where the minimum required is 75 feet, also from §197-35 C for a proposed pool setback to the crest of the dune of 19.6 feet where the minimum required is 75 feet, and from §197-63 P(1) for a proposed building area lot coverage of 48.7% where the maximum permitted is 25%.

VILLAGE OF WESTHAMPTON BEACH
ZONING BOARD OF APPEALS

-----X

In the Matter of Application of

Brian Lichter
Blair Lichter

DETERMINATION

Address: 371 Dune Road
SCTM #: 905-18-2-1.3

-----X

I. REQUEST FOR RELIEF

The applicants, Brian Lichter and Blair Lichter, are the owners of a parcel of real property located at 371 Dune Road. The property is located wholly within the R-3 Zoning District. According to the existing conditions survey of the property drawn by Colonial Surveying, P.C., Joseph Seccafico, PLS dated May 22, 2020, and last revised on May 4, 2021 (labeled “Existing”), the parcel is improved by a two-story frame dwelling with an enclosure below, second story deck and inground swimming pool and wood deck, a tennis court, and wood walk with railing and stairs.

Section 74-5.C.2 of the Village Code provides that, in the structural hazard area, the construction of nonmovable structures or placement of major nonmovable additions to an existing structure is prohibited.

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Section 197-8.D. of the Village Code provides that, in the R-3 Zoning District, there shall be two side yards totaling not less than 50 feet, neither of which shall be less than 20 feet; and the rear yard shall not be less than 75 feet.

Section 197-35.B.1. of the Village Code provides that In the Residence District 3, accessory buildings, structures, tennis courts and swimming pools shall not be located in the side yard on lots lying on the south side of Dune Road.

Section 197-63.P (1) of the Village Code provides that lot coverage including the tennis court shall not exceed 25%.

Based on the proposed conditions survey of the property drawn by Colonial Surveying, P.C., Joseph Seccafico, PLS dated May 22, 2020, and last revised on May 13, 2021, and the site plan and building plans prepared by Design Works Architectural Group, dated 4/22/21 and 4/15/21, respectively, the applicant seeks to reconstruct the dwelling and some associated decking, but otherwise not alter the pool and its deck, or the tennis court. The applicant requests variances from the following sections:

- §74-5 C(2), to allow the construction of a nonmovable structure (dwelling) within the Coastal Erosion Hazard Area where specifically prohibited,
- §197-8 D, for a proposed side yard setback of 15.1 feet where the minimum required is 20 feet,
- §197-8 D, for a proposed combined side yard setback of 42.3 feet where the minimum required is 50 feet,
- §197-8 D, for a proposed rear yard setback of the dwelling to the crest of the dune of 40.7 feet where the minimum required is 75 feet,
- §197-35 A, for a proposed accessory attached deck/catwalk located in the side yard where specifically prohibited, and
- §197-63 P(1), for a proposed building area lot coverage of 48.7% where the maximum permitted is 25%.

Notably, the application was originally advertised to seek additional variances from §197-35 C, relating to the deck and pool, but the applicant is no longer proposing to replace the rear deck and pool and has withdrawn those requested variances.

II. SEQRA

The applicant submitted an Environmental Assessment Form Part I pursuant to the State Environmental Quality Review Act (SEQRA). Since this is a request for variances for single family residences and accessory residential structures, the application is classified as a Type II action under 6 NYCRR § 617.5(c)(11), (12), (16) and (17). Accordingly, the application is not subject to review under SEQRA.

III. ZBA PROCEEDINGS

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This application was duly noticed for a public hearing, which was opened on June 17, 2021. The applicant's attorney, James N. Hulme, Esq., appeared on behalf of the application, together with Brian and Blair Lichter, applicants and Rocco J. Lettieri, Contractor. Ira Levine, Esq., on behalf of Gail Rubenstein and Barbara Rubenstein, 365 Dune Road submitted a letter dated June 15, 2021 in opposition to the application, and Mark Hissey, 379 Dune Road, Dune Deck appeared in opposition to the application. The hearing was closed for a determination at the June 17, 2021 meeting.

GOVERNING LAW

The Zoning Board is empowered to grant area variances pursuant to Section 7-712-b of the N.Y. Village Law and Section 197-75 of the Village Code.

In considering applications for area variances, the Board is required to weigh the benefit to the applicant against the detriment to the health, safety and welfare of the community, while considering the following five factors: (1) whether the variance will cause an undesirable change in the character of the neighborhood or a detriment to nearby properties; (2) whether the benefit can be achieved by a feasible alternative; (3) whether the variance is substantial; (4) whether the variance will have any adverse physical or environmental impacts; and (5) whether the alleged difficulty was self-created (which shall be relevant but shall not necessarily preclude the variance).

The Board is charged to grant only the minimum variance necessary and to preserve and protect the character of the neighborhood and the health, safety and welfare of the community. The Board is also empowered to impose reasonable conditions to minimize any adverse impacts from the variance.

Finally, the Zoning Board is empowered to grant coastal erosion variances from Chapter 74 where the strict application of the standards of such chapter may cause practical difficulty or unnecessary hardship and the applicant has met the specific requirements of Section 74-13(A)(1) of the Village Code. The more general practical difficulty/unnecessary hardship standards were, in the context of zoning codes, replaced by the more detailed five-factor balancing test described above. While there can be distinctions between the zoning standards and the practical difficulty standards governing coastal erosion variances, in this case, the relevant considerations for a coastal erosion variance overlap and are concurrent with the relevant considerations for a zoning variance. The various variances will therefore be considered together.

IV. FINDINGS AND CONCLUSIONS

With respect to the statutory requirements for a variance, the Board finds as follows:

1. *Character of the Neighborhood:* The applicant has demonstrated that the proposed variances will not cause a material adverse impact on the character of the neighborhood. The present conditions of the property include a tennis court at the north end of the property, a house south of tennis court that is located directly on the coastal erosion hazard area line, and a deck and pool located south of

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the house and south of the coastal erosion line. The applicant seeks no relief relating to the tennis court or deck/pool, which are not being altered. The relief would, if granted, improve the conditions of the house by increasing the dune crest setback of the house slightly. The house will also be designed to current FEMA and sanitary system standards.

2. *Alternatives:* Due to the existing constraints of the tennis court, there are no alternatives to achieve the benefits sought without variance relief.

3. *Substantiality:* The variances are substantial.

4. *Physical/Environmental Impacts:* No physical or environmental impacts have been identified.

5. *Self-Created Difficulty:* The difficulty is self-created.

6. *Benefit vs. Detriment:* The benefit to the applicant outweighs the detriments to the community.

7. *Minimum Variance:* The variances are the minimum necessary to achieve the benefits sought.

The Zoning Board therefore grants the requested variances, to allow the construction of a new two story single family dwelling, as shown on the survey drawn by Colonial Surveying, P.C., Joseph Seccafico, PLS dated May 22, 2020, and last revised on May 13, 2021, and the site plan and building plans prepared by Design Works Architectural Group, dated 4/22/21 and 4/15/21, respectively (collectively, the "Final Plans"), subject to the following Conditions necessary to mitigate the impacts of the variances:

V. CONDITIONS

1. The variances granted herein are limited to the relief set forth in this decision, and pertain only to the structures as they are depicted on the Final Plans, and shall not be construed as creating conforming dimensions. There shall be no further extension (horizontally or vertically), increase, alteration or modification to the structures located on the property that has non-conforming dimensions, without further approval of the Board.

2. No outdoor accessory structures or equipment (including but not limited to air conditioning condensers, HVAC equipment, above-ground utilities, generators, pool equipment, solar panels, garbage/storage bins, etc.) may be located within a required front, side, or rear yard, except as depicted on the approved plans, without further approval of the Board.

3. There can be no exterior work performed on weekends from May 1 to September 30 and on weekdays from July 1 to September 10.

4. The variances granted herein shall terminate unless a building permit is issued within one year from the date hereof and construction completed according to said building permit.

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Dated: July 15, 2021

Village of Westhampton Beach
Zoning Board of Appeals

Motion was made by Mr. Piering to adopt the determination of **Brian and Blair Lichter, 371 Dune Road (905-18-2-1.3)** as written; seconded by Mr. Badzik and unanimously carried 5 ayes, 0 nays, 0 absent.

2. Barbara Schnitzer, 423 Dune Road (905-017-05-030) Applicant requests variance from §197-35 C to legalize a deck extension constructed 9.34 feet from the property line where a minimum of 20 feet is required and from §197-10 B(1) for a resultant building area lot coverage of 26.2% where a maximum of 20% is permitted.

VILLAGE OF WESTHAMPTON BEACH
ZONING BOARD OF APPEALS

-----X
In the Matter of Application of

Barbara Schnitzer

DETERMINATION

Address: 423 Dune Road
SCTM #: 905-17-5-30

-----X

VI. REQUEST FOR RELIEF

The applicant, Barbara Schnitzer, is the owner of a parcel of real property located at 423 Dune Road. The property is located wholly within the R-5 Zoning District. According to the existing conditions survey of the property drawn by Lisa McQuilkin, Land Surveying dated March 24, 2021, and last revised on May 27, 2021, the parcel is improved by a one-story frame residence and wood deck, wood steps and landing.

Section 197-35.C. of the Village Code provides that, in the R-5 Zoning District, accessory buildings, structures, tennis courts and swimming pools cannot be located closer than 20 feet to any lot or boundary line.

Section 197-10.C(1) of the Village Code provides that, in the R-5 Zoning District, The building area lot coverage shall not exceed 20% of the lot area.

The applicant seeks variances from the above sections to legalize a deck extension that, as depicted on the survey, was built 9.3 feet from the westerly property line, where 20 feet is required, and with a resulting lot coverage of 26.2%, where the maximum allowable is 20%.

II. SEQRA

The applicant submitted an Environmental Assessment Form Part I pursuant to the State Environmental Quality Review Act (SEQRA). Since this is a request for variances for single family residences and accessory residential structures, the application is classified as a Type II action under 6 NYCRR § 617.5(c)(11), (12), (16) and (17). Accordingly, the application is not subject to further review under SEQRA.

VII. ZBA PROCEEDINGS

This application was duly noticed for a public hearing, which was opened on January 21, 2021. The application was renoticed on June 17, 2021, to include the coverage variance. The applicant's architect, Diane Herold appeared on behalf of the application. The hearing was closed for a determination at the June 17, 2021 meeting.

GOVERNING LAW

The Zoning Board is empowered to grant area variances pursuant to Section 7-712-b of the N.Y. Village Law and Section 197-75 of the Village Code.

In considering applications for area variances, the Board is required to weigh the benefit to the applicant against the detriment to the health, safety and welfare of the community, while considering the following five factors: (1) whether the variance will cause an undesirable change in the character of the neighborhood or a detriment to nearby properties; (2) whether the benefit can be achieved by a feasible alternative; (3) whether the variance is substantial; (4) whether the variance will have any adverse physical or environmental impacts; and (5) whether the alleged difficulty was self-created (which shall be relevant but shall not necessarily preclude the variance).

The Board is charged to grant only the minimum variance necessary and to preserve and protect the character of the neighborhood and the health, safety and welfare of the community. The Board is also empowered to impose reasonable conditions to minimize any adverse impacts from the variance.

VIII. FINDINGS AND CONCLUSIONS

With respect to the statutory requirements for a variance, the Board finds as follows:

8. *Character of the Neighborhood:* The applicant has demonstrated that the small deck extension will not have any material adverse impacts on the character of the neighborhood. The Pond Point neighborhood is unique and predominated by homes with nonconforming dimensions. The pre-existing conditions on the property are nonconforming, and the small deck extension of approximately 3 feet will not materially impact the pre-existing conditions.

9. *Alternatives:* Due to the constrained lot size and double front yard setbacks, the applicant cannot achieve the benefit sought without variance relief.

10. *Substantiality:* While the final nonconformities (9.3' setback where 20' is conforming, and 26.2% coverage where 20% is conforming) are mathematically substantial, the substantiality is mitigated by the pre-existing conditions (12.6' setback and 25.3% coverage). As a result, the actual increase in those nonconformities is not considered substantial in the context of this application and property.

11. *Physical/Environmental Impacts:* No physical or environmental impacts have been identified.

12. *Self-Created Difficulty:* The difficulty is self-created.

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13. *Benefit vs. Detriment:* The applicant has demonstrated that the benefits outweigh the detriments, if any, from the granting of the variances.

14. *Minimum Variance:* The variance is the minimum necessary to achieve the benefit sought.

The Zoning Board therefore grants the requested area variances from Sections 197-35.C and 197-10.C(1) of the Village Code to legalize a deck extension that was constructed 9.34 feet from the property line, with a 26.2% resulting lot coverage, as shown on the survey drawn by Lisa McQuilkin, Land Surveying dated March 24, 2021, last revised on May 27, 2021 (“Final Plans”), subject to the following Conditions:

IX. CONDITIONS

3. The variances granted herein are limited to the relief set forth in this decision, and pertain only to the structures as they are depicted on the Final Plans, and shall not be construed as creating conforming dimensions. There shall be no further extension (horizontally or vertically), increase, alteration or modification to the structures located on the property that has non-conforming dimensions, without further approval of the Board.

4. No outdoor accessory structures or equipment (including but not limited to air conditioning condensers, HVAC equipment, above-ground utilities, generators, pool equipment, solar panels, garbage/storage bins, etc.) may be located within a required front, side, or rear yard, except as depicted on the approved plans, without further approval of the Board.

3. There can be no exterior work performed on weekends from May 1 to September 30 and on weekdays from July 1 to September 10.

4. The variances granted herein shall terminate unless a building permit is issued within one year from the date hereof and construction completed according to said building permit.

Dated: July 15, 2021

Village of Westhampton Beach
Zoning Board of Appeals

Motion was made by Mr. Piering to adopt the determination of **Barbara Schnitzer, 423 Dune Road (905-17-5-30)** as written; seconded by Mr. Wittschen and unanimously carried 5 ayes, 0 nays, 0 absent.

3. Jodi Scherl, 452 Dune Rd (905-017-01-002.02) Applicant requests variances from §197-8 D to construct a second-story addition with a side yard setback of 18.4 feet where the minimum required setback is 20 feet, and with a resultant combined side yard setback of 38.4 feet where the minimum required is 50 feet.

VILLAGE OF WESTHAMPTON BEACH
ZONING BOARD OF APPEALS

-----X

In the Matter of Application of

Jodi Scherl

DETERMINATION

Address: 452 Dune Road

SCTM #: 905-17-1-2.2

-----X

X. REQUEST FOR RELIEF

The applicant, Jodi Scherl, is the owner of a parcel of real property located at 452 Dune Road. The property is located wholly within the R-3 Zoning District. According to the existing survey of the property drawn by Fox Land Surveying, David H. Fox dated November 17, 2020, and last updated on May 21, 2021 the parcel is improved by a one-story frame house and wood deck.

Section 197-8.D. of the Village Code provides that, in the R-3 Zoning District, there shall be two side yards totaling not less than 50 feet, neither of which shall be less than 20 feet.

Applicant requests variances from §197-8 D to construct a second-story addition with a side yard setback (at the Northeast corner of the addition) of 18.4 feet, where the minimum required setback is 20 feet, and with a resultant combined side yard setback of 36.1 feet, where the minimum required is 50 feet.

XI. SEQRA

The applicant submitted an Environmental Assessment Form Part I pursuant to the State Environmental Quality Review Act (SEQRA). Since this is a request for variances for single family residence and associated accessory residential structures, the application is classified as a Type II action under 6 NYCRR § 617.5(c)(11), (12), (16) and (17). Accordingly, the application is not subject to review under SEQRA.

XII. ZBA PROCEEDINGS

This application was duly noticed for a public hearing, which was opened on April 15, 2021. The applicant's attorney, James N. Hulme, Esq., appeared on behalf of the application, together with Saul Scherl. Chris Kelley, Esq., and Joan McGivern, Esq., of Twomey, Latham, Shea et al., appeared on behalf of Andrew Price, 450 Dune Road, Westhampton Beach and Pamela Porgues, 448 Dune Road, Westhampton Beach in opposition to the application. The hearing was closed for a determination at the June 17, 2021 meeting.

GOVERNING LAW

The Zoning Board is empowered to grant area variances pursuant to Section 7-712-b of the N.Y. Village Law and Section 197-75 of the Village Code.

In considering applications for area variances, the Board is required to weigh the benefit to the applicant against the detriment to the health, safety and welfare of the community, while considering the following five factors: (1) whether the variance will cause an undesirable change in the character of the neighborhood or a detriment to nearby properties; (2) whether the benefit can be achieved by a feasible alternative; (3) whether the variance is substantial; (4) whether the variance will have any adverse physical or environmental impacts; and (5) whether the alleged difficulty was self-created (which shall be relevant but shall not necessarily preclude the variance).

The Board is charged to grant only the minimum variance necessary and to preserve and protect the character of the neighborhood and the health, safety and welfare of the community. The Board is also empowered to impose reasonable conditions to minimize any adverse impacts from the variance.

XIII. FINDINGS AND CONCLUSIONS

With respect to the statutory requirements for a variance, the Board finds as follows:

15. *Character of the Neighborhood:* The applicant has demonstrated that the granting of the requested variances will not have a material adverse impact on the character of the neighborhood. The subject property is a unique and irregularly-shaped parcel, with 75 feet of frontage along Dune Road, a straight-line western boundary, approximately 100 feet of frontage along Pont Point Pond, and an irregular eastern boundary that narrows the width of the property in the southern portion thereof but widens in the middle area of the property, where the existing one-story house is located. The second story addition is proposed to be constructed generally atop the existing first-floor but with some small variations of the footprint. The existing dwelling is nonconforming as to, among other things, the side yard setback of 17.5 feet from the westerly lot line, where 20 feet is required, and a combined minimum side yard setback of 40 feet, where 50 feet is required. The second story addition was designed so as to conform to the side yard setback of from the westerly lot line with a minimum of 20.3' setback (at the northwest corner of the second story), but it requires a side yard setback from one point along the easterly lot line, because the northeast corner of the second story is 18.6 feet from a narrow corner of the irregular easterly lot line. The resulting combined side yard setback for the new dwelling (i.e., the first-floor westerly side setback of 17.5 feet plus the second floor easterly side setback of 18.6) is 36.1 feet, where 50' is required. The new point of nonconformity at the northeast corner

of the addition is, due to the irregularly-shaped boundary line, not close in proximity to any adjacent homes, as the neighbor to the east (the closest neighbor to this nonconformity) has a home that is constructed well over 100 feet to the south of this point of nonconformity. In light of the existing first story setbacks, and the unique, irregular-shape of the parcel – which effectively requires construction of a home in the location that it is presently in – the addition of a second story within the general footprint of the first story cannot be said to create a material adverse impact on the character of the neighborhood.

To the extent some neighbors have complained generally about the size of the house increasing to the point where they believe the size is out of character with the neighborhood, this position fails to acknowledge that the applicant can expand the size of the building (by adding a second floor) as of right, with no need for variance relief. The applicant is not seeking a floor area variance, and the only reason variances are necessary for the addition is that the irregular shape of the lot leads to a point along the northeast corner of the addition where the setbacks are reduced to below the permitted minimum setbacks. The general complaints about the size of the house (which does not violate any zoning regulation) are not specifically related to the impacts that arise from setback nonconformity.

The Board also notes that the neighborhood analysis presented by some of the neighbors to show that the size of the house would be out of character with the size of other houses includes many homes and properties that are in the “Pond Point” neighborhood that is zoned R-5, rather than the Dune Road neighborhood that is zoned R-3, where the subject property is located. The R-5 district is a unique zoning district in the Village where minimum lot sizes are only 6,000 sf and minimum lot widths are 60 feet, as compared to the 20,000 sf and 100-foot minimums applicable to the R-3 district. The houses are, as a result of the smaller lots and higher density, generally much smaller in the R-5/Pond Point neighborhood than they are in the R-3/Dune Road neighborhood. In short, the neighbors’ proposed analysis of the neighborhood is an apples-to-oranges comparison, because it incorporates the R-5 neighborhood’s lot and house sizes as if they served as a guideline for the houses sizes that should exist in the R-3 Dune Road neighborhood.

16. *Alternatives:* Due to the unique lot configuration, pre-existing footprint of the building, and lack of alternative locations suitable for the addition, the applicant has

demonstrated that there are no alternatives, feasible to the applicant, to achieve the benefits sought.

17. *Substantiality:* In comparison to the conforming individual minimum setback requirement of 20 feet, the proposed individual setback requirement of 18.6 feet is not substantial, either mathematically or in the context of this parcel, which is irregularly shaped. With respect to the 36.1-foot combined side yard requirement, that nonconformity would be mathematically substantial compared to the required 50-foot combined side yard, but in the context of this unique property, the nonconformity is not substantial because (a) it is only a 3.9-foot deviation from the pre-existing nonconforming combined side yard for the first floor (40 feet), and (b) the mathematical nonconformity is largely a result of a single new point of nonconformity where the northeast corner of the house is setback from an inverted corner of the irregularly-shaped easterly lot line (in other words, this is not a consistent nonconformity that relates to the entire side yard of the home, and most of the home is, in fact, conforming to the minimum setbacks). The Board also notes that it has been traditionally more flexible when reviewing combined side yard requirements on Dune Road where the individual side yards are conforming, which is the case with respect to all but the existing northwest corner of the first floor (which has a 2.5-foot nonconformity) and the new northeast corner of the second-floor addition (which would have an insubstantial nonconformity of 1.4 feet).

18. *Physical/Environmental Impacts:* No physical or environmental impacts have been identified. The Board notes that some of the neighbors have questioned whether the increased house size will result in an impact as a result of the sanitary system that would be needed to accommodate the increased house size. The Zoning Board does not, however, regulate sanitary systems, which are regulated by the Suffolk County Department of Health Services. In any event, the applicants will be required, as a result of the addition, to upgrade their sanitary design to meet current Suffolk County Sanitary Code standards, which, as of July 1, 2021, have included a requirement for new low-nitrogen, innovative/alternative sanitary systems that are improvements as compared to the prior systems constructed under older sanitary code standards.

19. *Self-Created Difficulty:* The difficulty is self-created.

20. *Benefit vs. Detriment:* On balance of all the factors, the Board finds that the benefits to the applicant outweigh the detriments, if any, to the community.

21. *Minimum Variance:* The variances are the minimum necessary to achieve the

benefits sought.

22. *Neighbors' Additional Arguments:* One of the primary arguments against the application raised by some of the neighbors is that a condition of a prior variance from 2014 prohibits the applicants from seeking further development of the property. The applicants are mis-interpreting the condition, however, which is a standard condition that has been included (with some variation over the years) in every variance this Board has issued for many years. The condition, as set forth in the 2014 decision, stated that the variances granted therein “are limited to the relief set forth in this decision and shall not be construed as creating conforming dimensions. There shall be no further extension, increase, alteration or modification to the structure or any other structure located on the property that has non-conforming dimensions.” The Board is well-familiar with this condition and its purpose and has repeatedly explained to other applicants and neighbors that the purpose of this condition is to make clear that any variance is limited to the relief granted therein, and the plans at issue therein, and should not be construed as creating a new “conforming” dimension. The reason the ZBA has seen fit to make this a standard decision is that the ZBA is aware of the common-law rule expressed by the Courts, whereby the granting of a variance is presumed to create a conforming dimension (which can then be extended horizontally or vertically), unless the ZBA clearly states conditions limiting the decision to the particular plans at issue. *See, e.g., Hoffmann v. Gunther*, 245 AD2d 511 (2d Dep’t 1997). The condition language used by the ZBA in all of its variances is intended to alert all owners that the decision pertains only to the particular plans and that any future changes to nonconforming dimensions would have to be presented to the ZBA in a new variance application. The ZBA has never interpreted this condition as prohibiting an owner from seeking future variances for different projects, nor does the ZBA believe that it could prohibit an owner from seeking future variances. This does not mean that past variances are irrelevant, and the Board can and often does look at the cumulative effect of multiple variances. But in this case, no such cumulative effects have been shown, and the Board declines to interpret the condition relied upon by the neighbors as if it were a prohibition against future development – an interpretation that was never intended by this Board.

23. *Decision:* The Zoning Board therefore grants the requested area variances from Section 197-8.D. of the Village Code to construct a second story addition with a side yard setback of 18.4 feet where the minimum required setback is 20 feet and with a resultant

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combined side yard setback of 38.4 feet, where the minimum required is 50 feet as shown on the survey drawn by Fox Land Surveying, David H. Fox dated November 17, 2020, and last updated on May 21, 2021 (“Final Plans”), subject to the following Conditions:

XIV. CONDITIONS

5. The variances granted herein are limited to the relief set forth in this decision, and pertain only to the structures as they are depicted on the Final Plans, and shall not be construed as creating conforming dimensions. There shall be no further extension (horizontally or vertically), increase, alteration or modification to the structures located on the property that has non-conforming dimensions, without further approval of the Board.

6. No outdoor accessory structures or equipment (including but not limited to air conditioning condensers, HVAC equipment, above-ground utilities, generators, pool equipment, solar panels, garbage/storage bins, etc.) may be located within a required front, side, or rear yard, except as depicted on the approved plans, without further approval of the Board.

3. There can be no exterior work performed on weekends from May 1 to September 30 and on weekdays from July 1 to September 10.

4. The variances granted herein shall terminate unless a building permit is issued within one year from the date hereof and construction completed according to said building permit.

Dated: July 15, 2021

Village of Westhampton Beach
Zoning Board of Appeals

Motion was made by Mr. Piering to adopt the determination of **Jodi Scherl, 452 Dune Road (905-17-1-2.2)** as written; seconded by Ms. Cea; and unanimously carried 5 ayes, 0 nays, 0 absent.

HOLDOVERS:

4. WHBH Real Estate LLC, 7 Beach Lane (905-011-03-010) Applicant requests variances from §197-16.4 A to construct a proposed parking area partially located in the front yard where specifically prohibited, from §197-16.4 D to construct additions resulting in a proposed building of 9,330 square feet in gross floor area where the maximum permitted is 6,000 square feet with special exception criteria per §197-80.2, from §197-17.1 to construct a cabana building with a rear yard setback of 8.3 feet where a minimum of 30 feet is required, from §197-29 C(2)(c) to construct proposed additions representing an increase and/or extension of area devoted to a nonconforming use of a hotel/inn where specifically prohibited, and from §197-63 for a proposed vegetated buffer to the south 5 feet in width where a minimum of 10 feet is required.

James N. Hulme, Esq., appeared on behalf of the application. He said that they applied to the Planning Board, and they are scheduled to appear before them on July 22, 2021, so he'd like to hold this over to August 19, 2021.

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Motion was made by Mr. Piering to holdover the application **WHBH Real Estate, LLC., 7 Beach Lane (905-11-3-10)** to August 19, 2021; seconded by Mr. Badzik and unanimously carried 5 ayes, 0 nays, 0 absent.

5. Egret Dune Corporation, 95 Dune Road (905-021-04-002) Applicant requests variances from §197-8 D for proposed side yard setbacks of 10 feet where the minimum required is 20 feet with a proposed combined side yard setback of 20 feet where the minimum required is 50 feet, and from §197-35 C for proposed accessory pool & deck with setbacks of 10 feet where the minimum required is 20 feet.

Nicholas A. Vero, Architect submitted a request to holdover the application to August 19, 2021.

Motion was made by Mr. Piering to holdover the application of **Egret Dune Corporation, 95 Dune Road (905-21-4-2)** to August 19, 2021; seconded by Mr. Musnicki and unanimously carried 5 ayes, 0 nays, 0 absent.

6. Nancy Burner, 168 Beach Lane (905-015-05-005) Applicant requests variances from §197-43 A(1) to erect driveway gates (fence) of 6 feet in height in the front yard where the maximum permitted height is 4 feet, and from §197-43 A(8) to erect driveway gates 4 feet from the street line where the minimum required setback is 20 feet.

Nicholas A. Vero, Architect appeared on behalf of the application. He stated that they submitted photographs, measurements and sketches and that identifies the location of the gates from the line of pavement and the lined roadway. As you can see the gate posts are pretty far back off of the line of the pavement. They are keeping the same proposal and maintain what was started and this Board was concerned about sidewalk traffic, and there is plenty of room to pull in to the driveway before hitting the gate posts without obscuring traffic which is what we were trying to show the Board. They'd like to close the hearing for the decision, and if they do not get the variance they will remove them and if the Board is going to tell them to move them back they will.

Mr. Piering said the sidewalk traffic, the car will be on the sidewalk and not in the driveway while you deal with the gate, and you have not given an alternative.

Mr. Vero said the only way the car won't sit on the sidewalk is if it's pushed back 20' and they won't need a variance; the car pulls up to a call box so you need the 20' and I know that's the requirement, and this application was made because its just what the applicant wants and they did show that it won't block cars in the roadway and there are other gates and its clear to see there are a lot of gates.

Mr. Piering said they did discuss those gates.

Mr. Vero said this is more unique because of the road at this point, it's not holding up people walking on the sidewalk or traffic in particular and if there's a car stuck waiting on a gate on the property line it's more problematic than foot traffic. I wouldn't be too concerned with bike traffic because they should ride with traffic and Mr. Berner felt it was far enough back and I did what the Board requested and showed the vehicular traffic, so what we are proposing is what they'd like a decision on. If we push it back 10' it won't help pedestrian traffic.

Mr. Badzik asked if the fence will remain in its location?

Mr. Vero said yes, and the deer still can go over the gate and fence. It's not about the deer as opposed to keeping people and animals in and out of the property. It's not about the fence, it will be 4' high in the front if that's the Code.

Mr. Piering asked if there were any questions or comments.

Motion was made by Mr. Piering to close the hearing of **Nancy Burner, 168 Beach Lane (905-15-5)** for a determination; seconded by Mr. Musnicki and unanimously carried 5 ayes, 0 nays, 0 absent.

7. All Sunset Lawn LLC, 25 Sunset Lane (005-04-018.02) Applicant requests variances from §197-1 for a proposed tennis court which represents an accessory structure/use on a lot without a principal single-family use where an accessory use must be located on the same lot as the principal use, and from §197-35 C for proposed tennis court setback of 11.6 feet where the minimum setback required is 15 feet.

James N. Hulme, Esq., appeared on behalf of the application. These are two lots that years ago were one lot and they were subdivided and created a vacant lot in the rear and it ran from Sunset Avenue to Sunset Lane and one fronts Sunset Avenue and now one fronts Sunset Lane and they are now owned by the same people under two separate LLC's and they are interested in maintaining them as two separate lots for future development or future sale, but for the near term they're hoping to improve the vacant lot with a tennis court to be used with the main house and its an accessory structure without a principal structure and a manner to link them for purposes of granting the variance, and that would lapse when and if there was no longer common control of both lots.

Mr. Piering asked about the covenants.

Mr. Hulme said he sent them to Maeghan and Tony today.

Ms. Mackie said she thought they were for Tony Pasca's review.

Mr. Hulme said the issue is the accessory use on the property without a principal use.

Mr. Wittschen asked him to briefly tell the Board what's in the covenant.

Mr. Hulme said sure; the rear lot may contain a tennis court the front and rear should be used and operated together as one lot; the ownership of the LLC's and should be only individuals and identical for both lots. In order to enforce the restrictions, the owners on the demand from the Village will indicate who the members of the LLC's are, and as long as they remain the same and used together there is no issue, if whoever fails to give that the relief is canceled and the property is in violation. And these restrictions continue until the tennis courts removed, or someone puts a principal use on the lot with the tennis court. These are just ideas and the goal is to link the two together so they move forward together as long as the tennis court is on the lot without the principal use and create a mechanism to deal with it if there's a violation. The C&R would be recorded against both properties and anyone who purchased one or both would know they're connected. I would be happy to get feedback from the Board or Counsel.

Mr. Wittschen said the one condition, the use is just a tennis court. It can't be a basketball court, a sports court, it can only be a tennis court.

Mr. Hulme said he will amend it and there may be additional thoughts. Also, to touch on, the issue of the neighbor across the street and its impact, because it's not a through lot we don't need a variance for two front yards, but my client contacted 22 Sunset Lane and that's across the street and we have an email that indicates their support in the relief, and he provided a copy of the email to the Board and for the record.

Mr. Musnicki said it looks like an attempt to work around, and that's okay but my struggle is and I don't know if it qualifies for a variance. It seems to be more of a planning board and trustee issue. A modification of the regulations of this chapter granted by the board of appeals on the ground of practical difficulty or unnecessary hardship.

Mr. Hulme said that's the old standard, the new standard is the balancing test.

Mr. Musnicki said this is the definition of a variance, because that's where we are. We're asking to move it closer, distances, coverage issues, and here we're talking about something that's in the ZBA and prohibited in the Code and you're asking to completely turn that around.

Mr. Hulme said there's a zoning code section that says you can't have accessory without principal and because it's in the Code you can vary on the proper showing which is the balancing test.

MR. Musnicki said maybe our attorney can address that.

Mr. Hulme said there is a business, George Vickers with a business on one property and on a separate use owned by that business with no principal structure that allowed for a sign and its commercial not residential and not an active use but in the context of this application, if the lots had not been divided we'd need variance relief to do it but it would seem more familiar to you and I'm trying to preserve the value of two lots but linking them back together sufficiently well to all appearances it is one lot and seeking the variances to do that. If it were one lot you would consider it.

Mr. Musnicki said that's a problem, can it be achieved by another method? Yes, it can.

Mr. Hulme said but then there's the factor of financial hardship.

Mr. Pasca said if Mr. Musnicki is asking my opinion, I don't have a conceptual problem that it could be done by a variance when you think about uses, you do have a residential use on a residential property and what is being asked to vary is the requirement that they be on the same lot and you can vary most anything in the Zoning Code and whether it meets the five factors is up to this Board and I think it's an area variance, and I think he can ask for it and what he's trying to do as far as the C&R's is to make it as close to the idea of one lot as possible, with the requirement in place that if the ownership changes it reverts back to vacant land and they have to get rid of the accessory use. It's up to this Board whether there are impacts and whether the applicant meets the five factors. Some things can be use variances, if they go beyond a residential use but an accessory residential use and they aren't trying to put something that's not customarily incidental there's just a division line between the two.

Mr. Musnicki thanked Mr. Pasca.

Mr. Hulme said the most obvious impact is the neighbor who has no issue. He will redo the covenants after Mr. Pasca reviews them and return in August to discuss that with the Board.

Motion was made by Mr. Piering to holdover the application of **All Sunset Lawn, LLC., 25 Sunset Lane (905-4-18.2)** to August 19, 2021; seconded by Mr. Wittschen and unanimously carried 5 ayes, 0 nays, 0 absent.

8. Jamandaly LLC, 33 Beach Lane (905-011-03-019) Applicant requests variances from §197-6 D for proposed side yard setbacks of 11.8 & 14 feet where the minimum required is 30 feet, and also from §197-6 D for a proposed combined side yard setback of 25.8 feet where the minimum required is 70 feet.

Heather A. Wright, Esq., submitted a request to hold the application of **Jamandaly LLC, 33 Beach Lane (905-11-3-19)** to August 19, 2021.

Motion was made by Mr. Piering to holdover the application of **Jamandaly LLC, 33 Beach Lane (905-11-3-19)** seconded by Mr. Badzik and unanimously carried 5 ayes, 0 nays, 0 absent.

NEW APPLICATIONS:

9. Westhampton Beach Country Club, 35 Potunk Lane (905-009-03-023.01) Applicant requests a permit from the Zoning Board of Appeals as provided by §197-29 C(1) to demolish a two-story dwelling utilized for staff housing and reconstruct a substantially similar building elsewhere on the property at a later date.

Kittric Motz, Esq., said they are seeking a special use exception permit; they'd like to demolish what is shown on the survey designated as the staff housing, and its 3,505.6 square feet with 8 bedrooms housing 16 to 18 staff members and has been legally merged with the larger parcel pursuant to this Board's decision in 2005 and we're seeking to do something similar to relief granted in 2013 which is the last ZBA decision in your packet. There's no change in the nature of the non-confirming use or the structure, it's residential in the R1 Zoning District, there's no intensification of the use and the structure is in poor condition and not warrant repair or renovation and the club would like to rebuild in a new location on the property; and a new code compliant structure and we're seeking a delay in the time to rebuild because they are trying to

develop a master plan for the property and they haven't had a chance to settle on everything, however they'd like to secure the variance, and they are years away from completing the steps and there's a lot of elements and aspects. They'd like to redevelopment the North Entrance the golf parking lot, to bring it up to the South entrance by the new traffic circle. There are safety concerns, the house is right against the parking lot and you have to make a blind 90 degree left turn into the parcel and if you demolish the house, you'll be able to see across and make it better. The children go from Junior Sports across the parking lot.

Mr. Wittschen asked if they are demolishing this and putting a new building in a new place, but you don't know where yet?

Ms. Motz said yes. It's very similar to what was granted in 2013.

Mr. Wittschen asked if they want to come back for another approval?

Ms. Motz said we're not expanding the area and if you grant permission to rebuild in a conforming location, is it just a matter of getting a permit?

Mr. Pasca said no you have to return to this Board because the ZBA decides whether it's not an expansion and meets the conditions of 29.C and if you aren't showing the replacement today they can't decide that. If they grant this variance, it will be conditioned on you returning with the plans to show the replacement so the Board can compare the plans to the now demolished structure to confirm it conforms to the conditions of 197-29.C.

Ms. Motz said okay.

Mr. Pasca asked how much time do you need? They can't leave this open, how much time do you realistically think they need?

Ms. Motz said they requested up to five years; I think realistically the master plan will be completed by the end of this year, and it will become because of the moving parts, and priorities and they can get replacement housing elsewhere but other concerns are more urgent before this so that's why we're requesting five years, but the demolition will be commenced now.

Mr. Hammond asked if there are floor plans with this?

Ms. Motz said they are not with this, but I know we can get a floor plan.

Mr. Hammond said it doesn't need to be architecturally done, but we should have something.

Mr. Pasca said we should have floor plans submitted to this Board before the demolition to keep a record of what's there so in five years we have something to look at.

Mr. Wittschen said they can ask for a bigger building, correct?

Mr. Hammond said yes. But they need to meet 197-29.C.

Ms. Motz asked who she should submit the floor plan to?

Mr. Pasca said to the ZBA. They just need a mechanism to track it.

Ms. Musnicki asked if there are restrictions on what can be built in place of this as far as Use on the property? Are you saying you can replicate it or build larger?

Ms. Motz said we aren't seeking to be larger, and if we needed to we would need this Boards permission. This is for staff housing.

Mr. Musnicki asked why they can't build something larger?

Ms. Motz said we could if you give us permission.

Mr. Pasca said the way the Codes written, the Country Club has a certain number of expansion rights, and normally a non-conforming use gets zero expansions, are there any expansion left?

Mr. Hammond said it's 25% of the principal building. The previous decision didn't say, and they can do 100% utility mechanical and storage, I wouldn't consider staff housing to be that, it's not so simple as we have 2,000 square foot factor, but it's a country club with a lot of uses going on so it's really open to the Boards interpretation.

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Mr. Pasca said it's a complicated question we don't have to answer today, but if you want to expand it will have to be answered.

Mr. Hammond said the clubhouse can be expanded 25% but this is an ancillary use.

Mr. Pasca said he believes the clubhouse used that already, but they did go to the Trustees who can allow them to expand if they want to or need to.

Ms. Motz asked Mr. Musnicki if his question was answered.

George Vickers said this got away from the Club because we moved staff to other locations, and it's in a real state of disrepair and normally we'd bring a new plan but we want to get rid of the structure because it's really unsafe and we came to Brad Hammond to ask to take it down, and now we're here to secure our pre existing rights and we don't have a plan for the new building, we're not looking to expand but we want to make sure we have staff housing because we house them around the Village. If we were here for equal to equal, we could, but we want to move it further from the street and in a more conforming location.

Mr. Piering asked if you know where you want to build it?

Mr. Vickers said kind of, we're working on it.

Mr. Hammond said the planning board will view it too, there's 40 acres in the Village owned by them and they will review it.

Mr. Piering said you need us to say we'll look favorably on a new structure in a new location, but you're not ready to do it now. You will have to come back.

Mr. Pasca said they're vesting their square footage so it's not lost when they demolish the existing structure,

Mr. Piering said okay. He asked if there were any questions or comments.

John McCaffrey, South Road said they live across the street and when they got this in the mail they thought it was two separate requests to demolish the house and get five years and I'm afraid that the new location will depreciate the value of my property. There is substantially similar word used in the advertisement what does that mean, can they go from three stories to two stories to one stories, and he'd like clarification on that. Does it have to be the same style as the existing or can it be new and modern.

Mr. Piering said we addressed that because we want to see the existing plans, and what they are proposing too.

Mr. McCaffrey said the current codes to build a new house, and I don't know how big 8 bedrooms are now, but will they meet today's code.

Mr. Piering said the square footage of the structure is the main thing, and the size of the house can only fit a certain number of bedrooms.

Mr. Pasca said those questions will be at the next phase, because then you should look at the prior plans and compare them to the new plans and if you have objections that's the time to discuss that.

Mr. McCaffrey thanked the Board for their explanation.

Diane McCaffrey said her question is geared for the five year plan, what would preclude the Country Club from saying five years from now, I'd like a new caddy shack with a hot dog stand, will the decision today be able to say this is the house and it can only be a house it can't be anything else.

Mr. Piering said yes, that's what we're saying. It's residential, and they have to come back to us to make sure it's residential again.

Mr. McCaffrey asked if they are approving the demolition today?

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Mr. Hammond said they don't need approval from the ZBA or the PB to get a demolition permit.

Mr. Pasca said if there's a non-conforming use and you voluntarily give it up you can lose the rights, but if you give it up in the process of rebuilding it you don't, they are saying the process will take longer, we can't demolish it now and rebuild it now, but we can demolish it now and rebuild it in five years.

Mr. McCaffrey said it seems like it's a safety issue right now?

Ms. Motz said yes.

Mr. Hammond said I chose the wording for the notice, so I chose substantially similar because there are a lot of talks about reconstruction after fire, and because of new Codes and FEMA and I talked to the applicants before and its an old house and now if you come to me tomorrow ot build staff housing, under the State Code this is commercial and has to be constructed differently and exits and sprinklers and I chose substantially, and maybe in the floor plans there's a 60 square foot bedroom that's too small to todays standards but that's why the floor plans we need on the record so in the future we can compare it all. Because of construction standards the Board can make that finding. We aren't asking 1 for 1.

Mr. McCaffrey said does that mean stick to the size of the footprint.

Mr. Hammond said that's the concept but that will be decided in the future.

Mr. Pasca said instead of saying five years, maybe set an initial period and give them the right to return to extend it. They can renew it subject to an explanation. Maybe three years, but its whatever the Board thinks is appropriate.

Mr. Musnicki agreed with Mr. Pasca, he said three years with a two-year option.

Mr. Vickers said they can submit a plan sooner but the question is the funding and build it within that time frame and if we did return next year and build it two years later, don't variances expire?

Mr. Pasca said you can extend them.

Mr. Vickers asked if they need a permit to extend?

Mr. Wittschen said no.

Ms. Motz said in two years this may need to go to a back burner so we'd need an extension, so I'm suggesting three years with a two-year extension.

Mr. Pasca said if you come back in two years and then its not a special permit and you just have to extend that approval.

Mr. Vickers said we're just trying to take down an eye sore and something unsafe.

Mr. McCaffrey said the sooner they take it down, the better.

Ms. Motz asked for three years, and a two-year extension.

Motion was made by Mr. Piering to close the hearing of **Westhampton Beach Country Club, 35 Potunk Lane (905-9-3-23.1)** for a determination; seconded by Mr. Badzik and unanimously carried 5 ayes, 0 nays, 0 absent.

Motion was made by Mr. Piering to adjourn the meeting at **6:00 p.m.**; seconded by Mr. Badzik and unanimously carried 5 ayes, 0 nays, 0 absent.