

Date of Decision: August 2, 2017

Date of Filing of Decision: September 1, 2017

**BEFORE THE BOARD OF ADJUSTMENT
OF THE TOWN OF DEWEY BEACH**

IN RE:

**APPLICATION OF TIMOTHY ELMER
RE: 26 VAN DYKE AVENUE, UNIT D
DEWEY BEACH, DELAWARE**

DECISION

The Board of Adjustment of the Town of Dewey Beach (the "Board") convened at 6:00 p.m. on Wednesday, August 2, 2017, at the Dewey Beach Lifesaving Station, 1 Dagsworthy Avenue, Dewey Beach, Sussex County, Delaware, to consider the application of Timothy Elmer (the "Applicant") for a variance from the off street parking requirement of two spaces required for a four bedroom residential unit to be constructed within the existing structure at 26 Van Dyke Street, Unit D, Dewey Beach, Delaware, also known as Sussex County Tax District 3-34, Map 23.06, Parcel 38.00, zoned Resort Residential.

Present for the Board of Adjustment were Chairperson Beverly Corelle and members Julie Johnson, Phillip Davenport, and Rick Dryer, representing a quorum of the Board, who participated in the consideration of and decision on the application; and Fred Townsend, Esquire, Board Attorney. Member Kathy Cherico, who did not participate in the consideration of or decision on the application due to a familial relationship with a realtor whose commission was tied to the approval of this variance application, did not attend the hearing. Also present were Bill Mears, the Building Official, the Applicant and the public.

SUMMARY OF EVIDENCE

Bill Mears described the unusual history of the subject parcel, which was developed under its prior zoning designation, resort business ("RB"). In 1999 the parcel was approved for construction of Van Dyke Villas I, a condominium complex under the zoning code requirement that the first floor be devoted to commercial uses only. Unlike the residential uses, commercial uses of 2000 square feet or less are not required to offer off-street parking. The present "mixed use" multi-unit condo was constructed in compliance with the dictates of the RB district and the resulting units were conveyed to independent owners. The upstairs units are occupied as residential units. Importantly, Mr. Mears testified that there existed no remaining space on the parcel to locate additional parking spaces.

Mr. Mears further indicated that in 2008 the parcel was rezoned resort residential ("RR") pursuant to a sweeping rezoning of many lots in the area that coincided with adoption of the

Town's initial comprehensive plan. He added that Unit D has never been built out and thus, has never been occupied. It remains today as it did in 1999, an unfinished shell.

The Applicant testified that he has Unit D under contract with the contingency that he obtain relief from the applicable off-street parking requirement. He is seeking relief from the zoning code requirement of two off-street parking spaces for a dwelling unit with four or fewer bedrooms. He affirmed there is no available space on the parcel to locate additional off-street parking. The applicant did not speak to whether any portion of the unit itself could be devoted to parking. Although the proper zoning of parcel is not an issue in this matter, the applicant testified that the subject parcel it is not suitable for a commercial use due to its location near the extreme south end of town, poor visibility from the coastal highway and a lack of foot traffic in the area.

Finally, Donna Stone, the Van Dyke Villas I HOA President, testified that the unfinished unit was an eyesore and was in need of investment. She stated the declaration of restrictions limited the permissible uses of the unit under the prior mixed use zoning district. She testified in favor of the application stating there was typically available parking on Van Dyke and that the character of the surrounding area was residential. No one testified in opposition. One previously submitted letter was made part of the record in opposition to the variance. It was not submitted by an adjacent property owner.

FINDINGS OF FACT

1. The Applicant is requesting a variance in the form of an exception from the requirement of two off-street parking spaces for residential uses in the RR district in order to apply for a permit to build out the unit as a dwelling.
2. The parcels adjacent to the subject unit are residential on all sides except directly across the street where a restaurant is located.
3. The subject unit has never been built out or occupied since its construction in 1999 and cannot be further improved as a residential use without relief from the zoning code.

CONCLUSIONS OF LAW

In *Mackes v. Board of Adjustment of Fenwick Island*, 2007 Del. Super. LEXIS 29, the Delaware Superior Court stated as follows:

The general rule is that variances and exceptions are to be granted sparingly, only in rare instances and under peculiar and exceptional circumstances. Otherwise, zoning regulations would be emasculated by exceptions until all plan and reason would disappear and zoning in effect would be destroyed. Moreover, prospective purchasers of property would have little confidence in nominal standards and would hesitate to purchase in a zoned area, where the zoning meant little in view of arbitrary, free and easy grants of variances by a zoning board. A variance should be strictly construed and granted only in cases of extreme hardship where the statutory requirements are present. Indeed, because a variance supports relief

from the literal enforcement of a zoning ordinance, it will be strictly construed to limit relief to the minimum variance which is sufficient to relieve the hardship. A board should not grant a variance greater than the minimum necessary to afford relief.

Id. at 14 (quoting 8 McQuillen Mun. Corp. §25.162 (3rd ed.)).

In considering a request for a variance or exception from a zoning requirement, a board of adjustment must determine whether exceptional practical difficulties exist. The exceptional practical difficulty standard is satisfied only when the difficulties alleged are practical rather than theoretical and exceptional rather than routine. *Bd. of Adjustment of New Castle County v. Kwik-Check Realty, Inc.*, 389 A.2d 1289, 1291 (Del. 1978). The following four factors must be considered when determining whether exceptional practical difficulties exist:

1. The nature of the zone where the property lies;
2. The character and uses of the immediate vicinity;
3. Whether removal of the restriction on the applicant's property would seriously affect the neighboring properties and their uses; and
4. Whether failure to remove the restriction would create unnecessary hardship or exceptional practical difficulty for the owner in making normal improvements to the property.

Id.

As a general rule, a board of adjustment must deny a variance request when the hardship claimed by the applicant has been self-created. *Janaman v. New Castle County Bd. of Adjustment*, 364 A.2d 1241, 1243 (Del. Super. 1976). Self-created hardship cases "have typically involved some type of affirmative action on the part of the land owner." *Dexter v. New Castle County Bd. of Adjustment*, 1996 Del. Super. LEXIS 495 at *5.

The applicant has an equitable interest in the subject parcel pursuant to his contract and thusly has standing to apply for a variance.

The Board finds that the Applicant has not demonstrated an exceptional practical difficulty in that he failed to establish that the circumstances presented by this parcel were truly unique. As such, the Board was concerned that the granting of this variance would lead to numerous similar requests for relief from off-street parking requirements which serve to benefit the community at large. The Board noted that the condo complex in question was deliberately overbuilt to render it unable to support an additional residential unit. Finally, the application was in furtherance of the Applicant's desire for convenience and profit. The requested variances are a matter of convenience, not necessity, for the Applicant, and, accordingly, must be denied. Granting this variance could threaten to emasculate existing zoning regulations.

DECISION

Based upon the foregoing, and the evidence presented to the Board, it is the decision of the Board, by a vote of three of the four members participating in the decision, to deny the application for relief from the off-street parking requirement applicable to residential uses in the RR zoning district

BOARD OF ADJUSTMENT OF THE
TOWN OF DEWEY BEACH

BY: Beverly Corelle
BEVERLY CORELLE, Chairperson

BY: Phillip J. Davenport
PHILLIP DAVENPORT

BY: Rick Dryer
RICK DRYER

DATED: 9-1-17 BRC