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VIA EMAIL AND REGULAR MAIL

December 29, 2022

Dewey Beach Board of Adjustment
c/o Bill Zolper, Town Manager
Town of Dewey Beach
105 Rodney Ave.
Dewey Beach, DE 19971

**RE: Sea Strand Unit D
Supplement to Board of Adjustment Application
TMP 334-20.10-40.00, 41.00, 42.00, 43.00, 44.00, 45.00**

Dear Town Manager Zolper:

I represent all the owners of Sea Strand Building “D”, units 31, 32, 33, 34, 35, and 36. In October, Claudia Cueto, owner of unit 32, submitted an application to the Board of Adjustment on behalf of the Sea Strand Building D owners. If granted, the variance requested in the Application would facilitate a half-story addition to the existing two-story building. The addition would create greater conformity with the other buildings in the Sea Strand community given that Building “C” added a half-story when it was rebuilt after a fire and the original flat roofs on Buildings “A” and “B” have been replaced with pitched roofs. The proposed half-story addition will conform to the Town’s 35-foot height limitation.

Please accept this supplement to the Application and provide it to the members of the Board of Adjustment.

The Sea Strand community is located in the Neighborhood Residential (NR) Zoning District and is accessed at the end of Chesapeake Street. There are four condominium buildings in the community, Buildings A, B, C, and D.

During the Board of Adjustment hearing scheduled to occur on January 5, 2023, the Board will consider my clients’ variance request under establish legal precedent that supports the granting of the variance.

Variance Requested

In the Neighborhood Residential (NR) Zoning District, where the building is located, the side yard setbacks are 8 feet unless the property abuts a side street, where the side yard setback is 12 feet.

The issue presented in this case is essentially a technicality. As illustrated by the County Tax Map below and the survey submitted with our application, each of the six units is situated on a separate parcel of land. Therefore, although the building comprising the individual units is a full 14.95 feet from the Chesapeake right-of-way (the outer boundary of the Sea Strand community), none of the units can satisfy the required 8-foot side yard setback because they are built to the boundaries of their individual parcels.

Illustration showing that Building D extends across six separate parcels



Consequently, we have requested a variance from Section 185-60(B) to permit a half-story addition within the 8-foot side yard setbacks. That Section provides:

§ 185-60 Extension of nonconforming use or building.

B. A building nonconforming only as to height, area, or bulk requirements may be altered or extended, provided such alteration or extension does not increase the degree of nonconformity in any respect. A building which does not conform to the required setbacks in any respect shall not be expanded either vertically or horizontally in the setback area.

I. Legal Standard

The Delaware Supreme Court has determined there are two types of variances, which are “use” variances and “area” variances.¹ The Court has indicated that a “use variance is a variance that changes the character of the zoned district by permitting [the land to be used for a purpose otherwise proscribed by the zoning regulations].”² However, an area variance, like the ones requested in the current application, does not involve a prohibited use, and “concerns only the practical difficulty in using the particular property for a permitted use.”³

¹ *Bd. of Adjustment of New Castle Cty v. Kwik-Check Realty, Inc.*, 389 A.2d 1289, 1291 (Del. 1978).

² *Id.* citing Anderson Am. Law of Zoning, §14.45 *et seq.* (1968).

³ *Id.* citing 2 Rathkopf, *The Law of Zoning & Planning*, 45-2 (1973 Supp.).

“Generally, [an area variance] allows deviations from zoning restrictions relating to the use of the property itself, such as the height, size or extent of lot coverage, size of the buildings, placement of the building on the site or other restrictions relating to the physical characteristics of the site.”⁴ “A use variance is subjected to the ‘unnecessary hardship’ test, while an area variance is subjected to the less burdensome ‘exceptional practical difficulty’ test.”⁵ In *Bd. of Adjustment of New Castle Cty v. Kwik-Check Realty, Inc.*, the Court concluded, “[s]uch [exceptional] practical difficulty is present where the requested dimensional change is minimal and the harm to the applicant if the variance is denied will be greater than the probable effect on the neighboring properties if the variance is granted.”⁶ When addressing an application for an area variance, the *Kwik-Check* Court set forth four factors to be considered by a Board of Adjustment:

[1][T]he nature of the zone in which the property lies[;] [2] the character of the immediate vicinity and the uses contained therein[;] [3] whether, if the restriction upon the applicant’s property were removed, such removal would seriously affect such neighboring property and uses; [and] [4] whether, if the restriction is not removed, the restriction would create [hardship] for the owner in relation to his efforts to make normal improvements in the character of that use of the property which is a permitted use under the use provisions of the ordinance.⁷

Additionally, the applicant for an area variance must not have created the exceptional practical difficulty in order for it to be granted.⁸

The current application satisfies each of the factors enumerated in *Kwik-Check*.

Exceptional Practical Difficulty

The exceptional practical difficulty associated with the Property arises from the fact that the structure exists in its present configuration. The Sea Strand buildings were constructed in the 1960s—years before Dewey Beach was incorporated as a Town in 1981. Comprehensive zoning regulations were not adopted in Dewey Beach until 1982. Over the past 40 years, the Town’s zoning regulations have been amended significantly. Given that Sea Strand Building D was constructed years before the Town was incorporated and adopted comprehensive zoning regulations, the building does not conform to the regulations as they were originally implemented and revised over the past 40 years. Consequently, it is exceptionally difficult to make normal improvements to the Property in a way that is compliant with present-day zoning requirements. Most importantly, the variance that has been requested will not be offensive to the

⁴ *Wawa, Inc. v. New Castle County Bd. of Adjustment*, 929 A.2d 822, 830-31 (Del. Super. 2005) citing *Kwik-Check*, 389 A.2d at 1291; *Mackes v. Bd. of Adjustment of Town of Fenwick Island*, 2007 WL 441954, *4 (Del. Super. Feb. 8, 2007) (“[a]n exceptional practical difficulty is present ‘where the requested dimensional change is minimal and the harm of the applicant if the variance is denied will be greater than the probable effect of the neighboring properties if the variance is granted.’”).

⁵ *Wawa, Inc.*, 929 A.2d at 831 citing *Council of Civil. Orgs. Of Brandywine Hundred v. New Castle Cty Bd. of Adjustments*, 1995 WL 717202, *11 .

⁶ *Kwik-Check Realty*, 389 A.2d at 1291.

⁷ *Id.* (citation omitted), see also, *Wawa*, 929 A.2d at 831; *Hollowka v. New Castle County Bd. of Adjustment*, 2003 WL 21001026, at *5 (Del. Super.).

⁸ See 9 Del. C. §6917(3)(c); *Bd. of Adjustment of Sussex Cty v. Verleysen*, 36 A.3d 326, 330 (Del. 2012).

neighbors. Instead, if approved, the addition would promote greater conformity with the other buildings in the Sea Strand community given that Building “C” added a half-story when it was rebuilt after a fire and the original flat roofs on Buildings “A” and “B” have been replaced with pitched roofs. Moreover, the proposed half-story addition will conform to the Town’s 35-foot height limitation. Stated differently, the harm to the applicant if the variance is denied will be greater than the probable effect on the neighboring properties if the variance is granted.

II. Variance Requested

Through their application, the owners of all units of Sea Strand Building “D” have requested a variance from Section 185-60(B) to permit a half-story addition within the 8-foot side yard setbacks.

Application of the *Kwik-Check* Factors

In this instance, the “harm to the applicant if the variance is denied will be greater than the probable effect on the neighboring properties if the variance is granted.”⁹ Each of the *Kwik-Check* factors are addressed below.

(1) The nature of the zone in which the property lies

The property is located in the Neighborhood Residential (NR) Zoning District, where the residential use is a permitted use. While the residential structures are limited to single-family detached dwellings in the NR Zoning District, the townhome structure, and those around it, has existed since the 1960s

(2) The character of the immediate vicinity and the uses contained therein

Sea Strand Building D is one of four townhome buildings in the Sea Strand Community. One of the existing buildings has been reconstructed to add an additional half-story, and the two other buildings have replaced flat roofs with pitched roofs. Consequently, the proposed addition is in character with the surrounding buildings and residential uses.

(3) Whether, if the restriction upon the applicant’s property were removed, such removal would seriously affect such neighboring property and uses

As evidenced by the several letters of support for the proposed expansion from neighboring property owners, the granting of the requested variance would not seriously affect neighboring property. Indeed, on May 19, 2018, the Sea Strand Homeowners Association voted to endorse the expansion. And given that the expansion will be compliant with the 35-foot height limitation, there has been no indication that the proposed expansion will hinder ocean views. Finally, the building comprising the individual units is a full 14.95 feet from the Chesapeake Street right-of-way, and

⁹ *Kwik-Check Realty*, 389 A.2d at 1291.

therefore but for the fact that each of the units are on a separate parcel, there would be no need for a setback variance for the proposed expansion.

(4) Whether, if the restriction is not removed, the restriction would create [hardship] for the owner in relation to his efforts to make normal improvements in the character of that use of the property which is a permitted use under the use provisions of the ordinance.

If the variance is not granted the owners will not be able to make normal improvements. The proposed expansion is clearly a “normal improvement,” as the three other buildings in the community have already expanded vertically. If the variance were to be denied, the owners would have no ability to expand in the same way that their neighbors have expanded.

* * *

Given that the owners have an exceptional practical difficulty, as described above, we respectfully request that the Board grant the requested variance.

We are enthusiastic about the proposed half-story addition to Sea Strand Building D and we look forward to presenting this application to the Board of Adjustment on January 5.

Sincerely,

A handwritten signature in black ink, appearing to read "Glenn C. Mandalas". The signature is stylized and cursive.

Glenn C. Mandalas, Esq.

cc: Mayor Bill Stevens
Mr. Fred Townsend, Esq
Sea Strand Building D Owners