

**TOWN OF DUCK
BOARD OF ADJUSTMENT MEETING
THURSDAY, FEBRUARY 14, 2019
MINUTES**

The Board of Adjustment for the Town of Duck convened at the Paul F. Keller Meeting Hall at 3:00 p.m. on Thursday, February 14, 2019.

BOARD OF ADJUSTMENT MEMBERS PRESENT: Chair Olin Finch, Carol Powell, Ed Sadler, Kent Zimmerman, and Alternate Tom O'Brien. Staff present: Director of Community Development Joseph Heard, Attorney Ben Gallop, Board of Adjustment Clerk Sandy Cross, and Permit Technician/Notary Kay Nickens.

MEMBERS ABSENT: Alternate Randy Morton.

OTHERS PRESENT: Planning Board Chair Joe Blakaitis, Planning Board Member Sandy Whitman, John and Susan Holte.

CALL TO ORDER

Chair Finch called the meeting to order at 3:10 p.m.

PUBLIC HEARING

Variance BOV-2019-001: An Application Submitted by Property Owners John & Susan Holte for a Variance of 2.6 Feet to Permit a Deck Constructed 27.4 Feet from the Static Vegetation Line on the Primary Dune to the Rear of Their Residence at 125 Sea Tern Drive. Town Code Section 156.124 Requires a Minimum Setback of 30 Feet from the Static Vegetation Line

Attorney Ben Gallop was recognized to speak. Attorney Gallop noted that the public hearing is a quasi-judicial one which was 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 in order to enact it. He noted that there are six standards and each one has to be passed with a 4/5 vote. If any of them fail, then the variance cannot be granted. He stated that the Board can place reasonable conditions on the final granting of the variance. He stated that after Director Heard and the applicants 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.

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, Sandy Cross, John Hatch and Susan Hatch.

Director Heard stated that the Board has before them an application for a variance at 125 Sea Tern Drive. He quoted Subsection 156.124(C)(2)(b) of the Town Code stating that accessory structures, such as decks, cannot be located within 30 feet of the static vegetation line. He stated that the property owners – John and Susan Holte - are seeking a variance from this setback standard to allow recently constructed decking on the rear of their residence to remain only 27.4 feet from the static vegetation line, thus encroaching 2.6 feet into the required 30-foot setback.

Director Heard explained that in most oceanfront areas of Town, the minimum building setback is measured from the first line of stable natural vegetation, typically located on the primary oceanfront dune. He stated that the first line of stable natural vegetation is determined on a property-by-property basis and staked onsite by a CAMA representative. He explained that just prior to the beginning of the beach nourishment project in 2017, the Town worked with CAMA officials to survey the existing vegetation and establish a static vegetation line from which future measurements are taken. He stated that since the subject property is in the beach nourishment area, the setback measurements are now taken from the static vegetation line.

Director Heard stated that on January 9, 2018, the applicants' contractor was issued a building permit to install new lower decks on the east and south sides of the house underneath an existing upper level deck. He stated that at the time of the application, Community Development staff made the applicants aware of the minimum setback standard and advised that obtaining an updated survey showing the stable natural vegetation line would assist in determining if the proposed decking will be compliant with setbacks. He stated that the applicants obtained a revised survey that showed the existing upper deck encroaching into the 30-foot setback. He added that the applicants informed staff that the proposed lower level deck would be reduced to a width of 5.7 feet to comply with the setback. He pointed out that, recognizing the potential issue with the applicants estimating the location of the setback, staff advised the contractor and issued the permit with a condition that specifically states the following: "No deck addition permitted within the 30-foot setback from the first line of stable natural vegetation."

Director Heard stated that the contractor constructed the lower level deck without obtaining additional survey guidance or markings in the field. He explained that the issue leading to the variance request was identified when the applicants submitted an as-built survey at the completion of the project. He added that the as-built survey showed the new decking on the rear of the house encroaching 2.6 feet into the required 30-foot setback from the static vegetation line. He noted that due to the encroachment, the constructed deck is not in compliance with the noted condition of the permit and the applicant has created a new nonconformity by expanding the amount of decking within the minimum setback.

Director Heard stated that Section 156.167 of the Duck Town Code states that when unnecessary hardships will result from carrying out the strict standards of the zoning ordinance, the Board of Adjustment may grant a variance from provisions of the zoning ordinance consistent with the spirit, purpose and intent of the ordinance, such that public safety is secure and substantial justice is achieved. He stated that during the evaluation of the variance application, the Board of Adjustment is required to consider and make findings on six criteria. He reiterated that if the Board finds that all six of the criteria have been met, then the Board should vote to grant the requested variance. He added that if the Board finds that one or more of the criteria have not been met, then they should deny the

requested variance. He stated that as part of its decision, the Board members may impose conditions on the approval of the variance, as long as the conditions are reasonably related to the variance. He stated that such conditions were often intended to mitigate any potential impacts resulting from the variance. The six criteria are as follows:

1. Section 156.167(A)(1) – Unnecessary hardship would result from the strict application of the ordinance. It shall not be necessary to demonstrate that, in the absence of the variance, no reasonable use can be made of the property.
2. Section 156.167(A)(2) – The hardship results from conditions that are peculiar to the subject property, such as location, size, or topography. Hardships resulting from personal circumstances, as well as hardships resulting from conditions that are common to the neighborhood or the general public, may not be the basis for granting a variance.
3. Section 156.167(A)(3) – The hardship resulted from actions taken by the applicant or the property owner. The act of purchasing the property with the knowledge that circumstances exist that may justify the granting of a variance shall not be regarded as a self-created hardship.
4. Section 156.167(D) – The requested variance is the minimum variance that will make possible the reasonable use of the land, building, or structure.
5. Section 156.167(E) – Granting the variance will be in harmony with the general purpose and intent of the Zoning Ordinance.
6. Section 156.167(E) – Granting the variance will not be injurious to the neighborhood or otherwise detrimental to the public welfare.

Director Heard stated that it is staff's opinion that the applicant has provided sufficient evidence to show that the requested variance is peculiar to the subject property (Finding 2), in harmony with the intent of the ordinance (Finding 5) and will not negatively impact the surrounding neighborhood (Finding 6). However, it is staff's opinion that the applicants have not satisfied the conditions of Findings 1, 3 and 4. Staff found that a reduced width of the lower level deck or removal of the deck does not interfere with the function of the house or present a significant hardship to the applicants. He added that the hardship occurred because the applicants chose not to have field survey markings during construction and did not comply with the conditions of the building permit. Director Heard noted that as all of the findings have not been met in staff's evaluation of the requested variance, staff is recommending denial of the variance application.

Chair Finch asked if the applicants had any questions. John Holte responded that he did not have any questions. Chair Finch asked if any members of Board have questions.

Member Powell asked if the variance is denied, will the pilings have to be removed. Director Heard stated that part of the deck complies, but one way or another, it would result in the removal or relocation of pilings in the area where the deck encroaches.

Member Sadler clarified that the code is written to protect the integrity of the dune. Director Heard stated that it is the stated purpose in the ordinance. Member Sadler stated that he visited the house and the pilings that support the upper level deck have been there for a long time. He isn't sure how long or if they are the original pilings. He thought if the new deck is attached to the existing pilings, it would not have affected the dune at all. He asked if that is the purpose of the code – to protect the dunes. Permit Coordinator Cross stated that it is. Member Sadler asked if it would hurt the dune if it

was changed to a 10-foot deck. Director Heard stated that there may not be additional pilings necessary. Member Sadler asked if it will hurt the dune if the deck is attached to the original pilings. Director Heard stated that it would during construction but would have less impact in the long-term. Member Sadler asked how construction will hurt the dune. Director Heard explained that there would be heavy equipment going in and out and around the dune as the deck is constructed. Member Sadler clarified that no holes would be dug. Director Heard stated he is correct. Member Sadler thought that building the deck that was built, additional pilings were put in and more holes were dug in the dune, which had an effect on the dune. He added that, in a way, requiring a six-foot deck instead of a 10-foot deck caused damage to the dune. Director Heard stated that there were additional pilings, so it would have.

Member Sadler stated that if the Board denies the application and required the applicants to take the deck down to a three foot one on one end and 5.7 inches on the other, it will create an odd-looking walkway. He added that they will end up having to move one or two pilings with more damage to the dune. He stated that the whole situation seemed that the Town made it very difficult and it could have been easy. He asked what will have been wrong with approving a 10-foot deck and attaching it to the dune. Chair Finch noted that that is not why the Board is meeting. Member Sadler thought it should be discussed because it is important. Chair Finch thought it should be a different subject. Member Sadler thought it is a unique situation and doesn't think that there are many houses in Duck that have a 10-foot top level deck and nothing underneath. He reiterated that it is a unique situation to have a deck underneath. Chair Finch pointed out that that discussion would have to start with the Planning Board and then they would make a recommendation to Town Council. Member Sadler stated that it does not make a lot of sense. Director Heard reminded the Board that the issue being discussed addresses the fifth criteria for the variance. Member Sadler stated that his point is that if the Town is trying to protect the dune, the situation should be left alone or else it should be approved. Member Zimmerman stated that the Board is not at that stage yet.

Member Zimmerman asked if what the Board heard from Town staff was sworn testimony. Attorney Gallop stated that Director Heard and Permit Coordinator Cross were sworn in. Member Zimmerman asked what date the static vegetation line was established. Permit Coordinator Cross stated that she did not have an exact date, but thought it was in early May prior to the beach nourishment project starting. Member Zimmerman clarified that the static vegetation line was established in May 2017. Permit Coordinator Cross stated he was correct.

Chair Finch asked if an old survey was used when the permit was applied for. Permit Coordinator Cross stated that the original submission received from contractor Emanuelson and Dad had an older survey. She added that the line of stable natural vegetation was not determined by the Town of Duck. She stated that she explained to the contractor that it was extremely close to what would be considered 30 based on the first line of stable natural vegetation. She stated that the contractor pulled the deck back to make it a little smaller and the survey was updated to reflect the static vegetation line. Chair Finch asked if the contractor showed the proposed deck addition. Permit Coordinator Cross stated that they did not show it on the survey, but separately on drawings. Chair Finch asked if the 30-foot line from the proposed deck was on the drawing for the permit. He asked how it got to that point. Chair Finch inquired if they obtained a permit without the 30-foot line shown on the survey. Permit Coordinator Cross stated that the 30-foot line was shown but the mid-level deck was not shown on the survey.

Chair Finch clarified that someone at some point had determined that the line was five feet from the house and that was the result of the revision. Permit Coordinator Cross stated he is correct. Chair Finch asked if the static line is five feet from the house. Director Heard stated that the as-built survey showed it as being as close as 3.1 feet to the house in the southeast corner. Chair Finch asked if the as-built survey shows the updated static line. Permit Coordinator Cross confirmed that it does. Chair Finch clarified that the second as-built survey is different from the first one. Permit Coordinator Cross stated he is correct. Chair Finch asked if both surveyors were working from lines that Town staff pinned. Permit Coordinator Cross stated that they were.

Chair Finch pointed out that there are two different surveys with two different lines – one was five feet away by scale as there are no numbers given and it appeared to be approximately half of a 10-foot deck. He asked if it was 10 feet on top. He stated that if the line was extended close to five feet in the southeast corner. He added that the proposed deck was 5.7 feet but was referenced as five feet. He asked if it was built at 5.7 feet or five feet. Permit Coordinator Cross stated that she does not measure the deck. Chair Finch stated that he was talking about the as-built when it was brought back. Permit Coordinator Cross stated that the as-built does not show the distance from the static line. Chair Finch pointed out that it doesn't show the lower deck. Director Heard stated that it is 5.7 feet based on information provided by the applicant. Chair Finch stated that the applicant applied for a deck that was five feet wide, but staff thought it was built at 5.7 feet. Director Heard stated that the applicant has stated that it is 5.7 feet wide in the application. Chair Finch pointed out that there is more than one inconsistency with two different surveys.

Member Zimmerman stated that there are two lines – one is the first line of stable natural vegetation and the other is the static vegetation line. He clarified that everything from the timeline in 2017 is supposed to come from the static vegetation line. Permit Coordinator Cross stated he is correct. Chair Finch pointed out that it was designated as the first line of vegetation. Director Heard stated that the static vegetation line was based on the first line of stable natural vegetation at the moment it was surveyed. He added that, once adopted, it replaced the first line of stable natural vegetation.

Member Zimmerman pointed out that when the permit was issued in January 2018, the term used in the condition was: "...no deck was permitted within 30 feet of the existing set of the first line of stable nature vegetation..." Permit Coordinator Cross stated he is correct. Member Zimmerman stated if one goes by what was on the permit, the deck is 30 feet back from that line. Director Heard stated that there wasn't a first line of stable natural vegetation to measure from as it no longer existed. He added that there is no other place to measure it to other than the static vegetation line. Chair Finch stated that it is the line and the deck is encroaching according to the most recent survey.

Chair Finch asked if the applicant has anything to present.

John Holte of 125 Sea Tern Drive was recognized to speak. Mr. Holte stated that there were two surveyors but there have been a total of four surveys completed since the project started. He stated that the question was addressed about the mid-level deck within the structure of the existing deck. He stated that it was their original intention in 2015 to add a mid-level deck of the same dimensions as the upper deck and it turned out that it was not permissible. He stated that they found out that they cannot attach the structure to the existing pilings as it has to be independently supported. He stated that their contractor at the time gave up on the project as it became too complicated. He stated that they then tried to figure out what they can do and in 2017 they decided to go ahead and see if they

could add a deck that was independently supported and 30 feet from the vegetation line. He stated that in September 2017 he had a survey completed by William Jones. He noted that the survey was completed in October 2017 and showed the first line of stable natural vegetation, which is contended to be inaccurate. He pointed out that this was the survey they looked at and planned from.

John Holte stated that the deck is parallel to the ocean and the dune. He stated that it made a lot of sense to build it that way and that is how they designed it. He stated that the deck they decided to build is 30.7 feet from the vegetation line, so the deck was built parallel to everything and done within that framework. He stated that they had to make a lot of modifications and moved the spa to the side in order to bring the deck out, but it could not be built outside of the footprint. He noted that it was all a learning process for him. He stated that the other side was brought back and at some point, Town staff wanted to him to have another survey completed. He wasn't sure if he was involved in that or not, but the survey showed the static vegetation line a little closer to the house.

John Holte stated that the original survey completed in October shows the first line of stable natural vegetation. Another survey was completed in mid-November by William Jones and had a static vegetation line. He stated that this static vegetation line was inconsistent with what he had seen with the first line of stable natural vegetation. He stated that he discounted it as he thought something was incorrect and didn't make any sense. He understood that when the beach nourishment project was done, the first line of stable natural vegetation was noted at that time, but he thought it was wrong as it wasn't near the previous the vegetation line. He stated that when the building permit was issued, he thought that everything had been resolved.

John Holte stated that with regard to the pilings, they had to install 12 pilings with four in the back area. He stated that it took two to three weeks to build the deck as it is relatively small. He stated that inspections were completed afterward. He added that they decided to replace another deck and went back to the contractor that built their previous deck and decided to get it built before the season. He stated that at that time, it turned out that a third survey was completed by William Jones in March showing the location of where the back deck was built and the distance from the vegetation line. He stated that when they submitted a permit for the building permit, they needed to have a fourth survey completed that explicitly showed the lower level deck, the distance from the vegetation line, and the width of the line. He stated that it is 5.7 feet as shown on the survey. He added that the survey also shows the front deck and construction started around the beginning of November. He did not receive the updated survey until mid-December and it was prepared by Seaboard Surveying. He explained that the reason it is from a different company was because William Jones had retired. He stated that he cannot say that he knew exactly what was needed at all times as it was a complicated process.

Member Powell asked about the consistency of the four surveys. She asked if they were all the same or different. John Holte stated that the first survey had the first line of stable natural vegetation, and the second one had a static vegetation line. Member Powell clarified that they were not the same. Mr. Holte stated that the lines were very different. Member Powell asked about the last two surveys. John Holte stated that they have a static vegetation line like the second survey. Chair Finch pointed out that the survey from William Jones on the static vegetation line is further from the house.

John Holte stated that the real hardship that the Board needs to consider was if they are allowed to have a rear mid-level deck, which is very small with stairs. He stated that everything is parallel to the house and it makes sense to have something of that type. He stated that they are looking to obtain a

variance to build the deck that is square to the house. He thought it is a hardship to build a deck and not have stairs that will be very useful. He stated that the hardship is that it would be a weird deck. He stated that they tried to slip past the rules and thought they could leave the deck where it is. He admitted that they made a mistake, but they did not do it for any ulterior purpose. He stated that they are sorry for the mistake and are trying to make it right. He felt that they should not be used as an example since people make innocent mistakes. He hoped that the Board will approach the variance based on its merits. He stated that they made a lot of changes to bring things into compliance. He stated that the actual hardship is why they are looking for a variance due to the vegetation line. He noted that it is not a hardship that they created.

Chair Finch asked John Holte how involved he was in the permitting process. John Holte stated that he was not involved at all but did interact with the contractor. He stated that he was actively involved in the original design and trying to bring it into compliance as he was involved in making the decisions. He stated that in regard to the actual permitting process, he never saw the permit. Chair Finch stated that at some point, someone was conscious of the static line being a set distance from the house. He added that that was why it was drawn at five feet. Mr. Holte agreed, adding that it was not the static line, but the first line of stable natural vegetation. Chair Finch noted that the standard is 30 feet back from the static line. He explained that the application has to be from the static line and pointed out that the Town's survey had the static line drawn on it at the time of the application. He stated that whoever the contractor had to have explained it to the applicant when it was drawn, and the applicant should have questioned why it was only five feet wide. He added that the contractor would have explained that it was 30 feet back. John Holte agreed but noted that he was a little naïve about the survey. Chair Finch asked if the contractor was directed on how wide to make the deck. John Holte stated that he did not recall telling the contractor to make it five feet but believed that he may have. Chair Finch asked if he scaled it. John Holte stated that he did. Chair Finch noted that it looks like someone was very conscious of the setback as the proposed width of the deck appears to be exactly five feet, and it would have been scaled to determine that.

Chair Finch asked where the nine inches came from. John Holte thought they would not comply at six feet with the vegetation line, so he had it brought back a little more. Chair Finch pointed out that the application showed the deck at five feet. Mr. Holte wasn't sure who made that decision. Mr. Holte stated that it is 0.7 feet. Chair Finch pointed out that 0.7 feet is eight-plus inches. He asked how the contractor was to build it at five feet and then it went to 5.7 feet. John Holte stated that he isn't sure, adding that there was a little cut in it. Chair Finch explained that it is due to the setback for the static line. He added that it would have been less than five feet the further south it went. Mr. Holte stated that the October survey showed the first line of stable natural vegetation, which does make it closer. Chair Finch stated that all anyone had to go by was the survey.

Member Zimmerman stated that if the Town used the survey dated November 10, 2017, which was after the static vegetation line was established, then it is clear. He thought he knew how it was done but added that it didn't matter. He thought it was measured off the northeast corner of the building, went out five feet, and then parallel to the building, not the static vegetation line. Chair Finch pointed out that the Town would not accept the first line of stable natural vegetation as they needed to see the static line. Member Zimmerman agreed. Chair Finch stated that the static line clearly has a 30-foot setback. He noted that Mr. Holte's testimony seems different as he thought he would have pointed out that he had a survey that was five feet off the house, they applied for five feet and were going to build a five-foot deck. He added that it made sense and he understood why the Planning Department

accepted the building permit application showing five feet. He wasn't sure how it went from five feet to 5.7 feet because Mr. Holte would have clearly been past the setback of the static line based on the survey provided for the building permit application as well as the size of the deck on the building permit application. He pointed out that it showed five feet, the static line setback showed five feet off the house by scale. He stated that it was an as-built house with the static line drawn by a surveyor with a setback of 30 feet, which is everything that the Town normally receives for a building permit application, and the deck was compliant on the drawing. as it was built, it was built at a minimum of eight inches inside of that.

Chair Finch stated that it got worse when William Jones retired, because the applicants used a new surveyor and he showed the static line in a totally different location – two feet closer to the house than William Jones showed. He thought the first thing the applicant should have done was to go back to William Jones and pay him to come out of retirement. He added that Town staff wants that piece of paper that had the surveyor's stamp on it. He noted that the applicant now has a bigger problem in that there are two different surveyors with two different numbers and the most recent as-built clearly shows an encroachment. He stated that the part that was not brought on by the applicant's actions was having two different surveys and two surveyors. He thought it is more of a reason for a variance than some of the other issues that were discussed. However, it is not the basis of the hearing or what the applicant is asking. He added that the applicant wants the Board to grant a variance to encroach by a certain amount. He noted that the applicant built the deck bigger than they had applied for, which is basis to blame on the contractor. He thought that could be basis for a variance. He pointed out that someone was very aware of the setback when the permits were applied for based on the paperwork. He added that William Jones' survey appeared to be exactly half of ten feet, which is what was on the permit application.

Chair Finch stated that this hearing was totally different from an application for a variance that the Board heard the previous month, where the deck was falling apart and there would have been no deck at all on the house. He stated that the stipulations of the application were different. He added that he can see why Director Heard picked out of the six criteria and agreed with certain items and not others.

Director Heard stated that there are a series of four surveys in the Board's packets. He explained that the first one that was brought in to staff showed the first line of natural vegetation on October 13, 2017. He noted that there was no first line that existed at that time and the line seemed generally parallel to the mean high-water mark. He added that the first line of stable natural vegetation should not have been on the survey as it did not exist at that time. Chair Finch asked if the applicant used that survey to apply the building permit. Director Heard stated that they did not. He stated that John Holte may have completed his design off that survey. However, staff asked for a revised survey and received one a month later, dated November 10, 2017. He noted that William Jones corrected it to show the static vegetation line. He pointed out that the orientation of the line had changed and was no longer parallel to the back of the house. He added that this was the survey that the permit was based on, which was issued in January 2018.

Chair Finch noted that John Holte is unsure of how he got to the point where he is. He noted that when looking at the surveys, it was consistent on what William Jones had drawn. He explained that the first survey that was brought in was not a current survey. The design was drawn at five feet as Mr. Holte thought he had more room in the depth. John Holte stated that it was drawn off the first survey. Chair Finch stated that once the new survey was prepared and showed the new static line and

angle, at that point he thought Mr. Holte did not feel he had to adjust the deck because it looked like it would fit. John Holte agreed, adding that he noticed that the line was different and ignored it thinking it was a mistake. He stated that when the building permit was issued, he thought the survey was correct. Chair Finch understood how both the contractor and Town staff would see that there could be five feet. He noted that five feet was reflected on the application. John Holte stated that he did not know how the contractor got the 5.7 feet from the survey.

Chair Finch stated that he could understand how John Holte made a decision where the deck meets the 30-foot setback, based on William Jones' survey. Member Zimmerman disagreed. He added that, given that the second survey existed in November 2017, there would be no reason to use the original one. John Holte stated that they used the original survey for the design. Chair Finch noted that it was for design purposes. He added that he could see how Mr. Holte may think his design could work with that. He noted that the Town thought it would have worked.

Chair Finch asked if any member of the audience had anything to add that will be substantially enlightening to the hearing. There were no comments.

Chair Finch closed the public hearing and began deliberation with the Board members.

Attorney Gallop pointed out that Director Heard has prepared two draft orders, one granting the variance and one denying it. He explained that the Board would normally go through the provisions one by one and come to a conclusion with the order drafted later. He stated that he gets asked if a board can vote on all of the items at once and he usually responds that they can if they think it will pass. He stated that if someone agrees with the order as written and agrees with the findings as written, it is not inappropriate for someone to make a motion to grant the variance by accepting the order as proposed, with a second and then a vote. He added that it was the same with denying it.

Chair Finch suggested that the Board look at the variance one item at a time before asking for a motion.

Chair Finch read the first condition that an unnecessary hardship would result from the strict application of the ordinance. It shall not be necessary to demonstrate that, in the absence of the variance, no reasonable use can be made of the property. He added that Director Heard's recommendation was that it did not compromise the functionality of the house. The Board agreed with Director Heard's recommendation.

Chair Finch read the second condition that the hardship resulted from conditions that are peculiar to the subject property, such as location, size, or topography. Hardships resulting from circumstances, as well as hardships resulting from conditions that are common to the neighborhood or general public, may not be the basis for granting the variance. Member Powell thought it was peculiar to the house that the static line was not parallel to the house. Chair Finch stated that it was peculiar to all properties as they are all unique. He noted that Director Heard agreed with Member Powell. The Board agreed with Director Heard's recommendation.

Chair Finch read the third condition that the hardship resulted from actions taken by the applicant or the property owner. The act of purchasing the property with knowledge that circumstances exist may justify the granting of a variance shall not be regarded as a self-created hardship. He stated that

Director Heard's opinion was that the hardship resulted from the actions of the applicants. He asked which specific action was the result of the applicants' decision. He noted that it was under the control of the applicants because they built the deck, they designed and approved the design of the deck. He thought the case could be made that it appears to scale close to five feet and it was drawn at five feet. He added that as a result, the applicant was trying to make it meet the requirements in the setback. Member Powell pointed out that the applicant mentioned that he discounted the second survey. Chair Finch agreed. Member Zimmerman stated that it seemed inconvenient and so it was ignored. Chair Finch stated that it wasn't ignored on the paper. Member Powell noted that the Board did not know where it went from five feet to 5.7 feet. Chair Finch stated that it was permitted to be built at five feet and it was eight inches too large. He pointed out that there was another circumstance that was beyond the applicant's control which was that a second surveyor came in and moved the line closer to the house. Member Zimmerman stated that he did not see that. Chair Finch stated that it was clearly closer to the house. Member Zimmerman pointed out that the applicant was told before the deck was built that it was very close to the static line and it was in the permit that it could not be within 30 feet. He added that the applicant chose to build the deck anyway.

Chair Finch stated that it was careless on the applicant's part and they are responsible for the carelessness. He added that they are responsible for the deck being eight inches bigger than the permit application. He added that if the applicant could get both surveyors to mark how far they were off the house, the applicant could demonstrate that the pre-survey showed them closer to being five feet than the as-built survey. He stated that the current as-built survey is different, and the applicant was acting on the survey from William Jones. He added that it didn't change a lot, but it did change the intent or whether or not they were part of it. He noted that their actions were based on the survey from William Jones and not the one from Seaboard Surveying. He pointed out that William Jones gave them more flexibility.

Chair Finch read the fourth condition that the requested variance is the minimum variance that will make possible the reasonable use of land, building, or structure. He noted that staff's opinion was that other reasonable, viable options are available. He stated that he agreed with Director Heard's opinion. He noted that it was a lack of communication, foresight and knowledge of what the applicant was dealing with. Member Powell thought if the applicant paid attention to the survey during the construction in addition to the additional 0.7 feet that could have been accommodated in the original structure. Chair Finch pointed out that it wasn't only during construction, the applicant should have paid attention before construction was started. Member Sadler agreed.

Chair Finch read the fifth condition that granting the variance will be in harmony with the general purpose and intent of the Zoning Ordinance. He noted that Director Heard was not arguing that point and the Town does not have an issue with it.

Chair Finch read the sixth condition that granting the variance will not be injurious to the neighborhood or otherwise detrimental to the public welfare.

Chair Finch explained that the Board members have to agree on all six conditions. Member Powell thought the Board is not in agreement on them. She stated that Condition 3 is a big problem. Chair Finch agreed, adding that Condition 4 is also a problem. He thought Condition 4 is the bigger problem.

Member Zimmerman moved to deny Variance BOV-2019-001 and adopt the order that was prepared. Alternate O'Brien seconded.

Motion carried 5-0.

MINUTES FROM THE JANUARY 6, 2019, MEETING

Chair Finch opened the approval of minutes from the January 6, 2019 meeting. He directed the Board to review the minutes from the January 6, 2019 meeting for changes.

Member Powell moved to approve the minutes as presented. Member Sadler seconded.

Motion carried 5-0.

BOARD COMMENTS

None.

STAFF COMMENTS

Director Heard reminded the Board members that the Town Council annual retreat would be held on February 20-21, 2019.

OTHER BUSINESS

None.

ADJOURNMENT

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

The time was 4:57 p.m.

Approved: _____
/s/ Secretary