

MYLES J. CALVEY and JANET M. CALVEY

61 Taunton Avenue, Dennis

ZONING BOARD OF APPEALS

NARRATIVE OF PROJECT

The Applicants, Myles J. Calvey and Janet M. Calvey, are the owners of the property at 61 Taunton Avenue, Dennis, Massachusetts. The Property is located in the R-40 Zoning District, contains approximately 6,739 square feet, approximately ½ of which is within 100 feet of a coastal bank, and is improved with a 2 story single family dwelling built in 2024. The existing structure is 4 feet from the easterly side boundary. The existing structure was the subject of a Special Permit issued by this Board in Case Number SP-021678-2023. Before the construction of this house, the property was improved with a one story, two bedroom dwelling built in approximately 1925, with a cement block barn located in the rear of the property, and which was completely located within 50 feet of the coastal bank. The relief allowed for the razing and replacing of both the house and bank with the new 2 story home currently in place. The prior house was 2 feet from the easterly boundary.

Construction of the new house commenced and because of the narrow lot, which is only approximately 39 feet wide, the house construction impacted the easterly neighbor's property. Some trees along the common boundary were broken, and the different elevations of the lots began to allow for erosion and destabilization of the soil between the properties. The construction also resulted in a steeper slope in the rear of the property. To address this issue, the applicant's contractor installed a retaining wall along the common boundary to provide lateral support, and a way of leveling the area around the new house to make it usable. This wall and support was installed between the new house and the common boundary, a width of only 4 feet, but which width was permitted by Special Permit in 2023.

The Dennis Building Commissioner has referred the applicant back to the Zoning Board of Appeals for a Variance pursuant to Dennis Zoning Bylaw Section 2.3.4.1.b, which states:

An area not less than ten (10) feet in width measured from and perpendicular to the lot line around the perimeter of the lot shall be landscaped with grass, trees, shrubs or other plants. Portions of this area may be paved for pedestrian and vehicular access but at no time shall the pedestrian and/or vehicular access be located within 10 feet of the side property lines.

This referral is based on the location of the retaining wall and other paver areas shown on the existing plan.

The language of MGL Chapter 40A, §10, states that a variance may be granted:

“where such permit granting authority specifically finds that owing to circumstances relating to the soil conditions, shape, or topography of such land or structures and especially affecting such land or structures but not affecting generally the zoning district in which it is located, a literal enforcement of the provisions of the ordinance or by-law would involve substantial hardship, financial or otherwise, to the petitioner or appellant, and that desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of such ordinance or by-law.”

In this case, I believe that this Board can issue that relief as the Petitioner can demonstrate all of these criteria.

HARDSHIP - In this case, I think that the Petitioners can establish hardship, financial or otherwise, in that the retaining wall was necessary in order to protect their financial investment of a new structure, and to allow them to enjoy their property to the fullest extent. As indicated, the cost to remove the retaining wall would be prohibitive, in addition to the danger that their abutter's lateral support would be compromised. Full compliance with the requirements of Section 2.3.4.1.b would potentially result in the loss of the use of their property, not to mention the improvements thereto. This is the definition of a hardship. In addition, it cannot be argued that the Applicants created their own hardship. They presented plans to the Town of Dennis for the construction of a new home, 4 feet from the lot line. The very act of building a house within the 10 foot buffer of Section 2.3.4.1.b, with the permission of the Town of Dennis, is a tacit prior approval of what is now requested.

The case of *Marshallian v. Zoning Board of Appeals of Newburyport*, 421 Mass 719 (1996) held that where only dimensional variances are involved, even a relatively minor “hardship” can justify a variance. Our case is a dimensional Variance – the lot is very narrow, and the inability to safely access the exterior of a home is a hardship. The current request to allow for some encroachment of a safety feature into the 10 foot buffer is certainly minor.

SHAPE, SOIL AND TOPOGRAHY – Please remember that when this Board considers a variance and the 3 criteria of the statute, the emphasis is on the land itself. In *Dowd v. Board of Appeals of Dover*, 5 Mass App Ct 148 (1977), the Court held that “the criteria in the act relate to the land and not to the applicant.” “At its root is a concern that a grant of a variance be based only upon circumstances which directly affect the real estate and not upon circumstances which cause personal hardship to the owner.” *Huntington v. Zoning Board of Appeals of Hadley*, 12 Mass.App.Ct. 715 (1981). In this case, the applicant can demonstrate that their hardship flows from not only the shape of the lot (extremely narrow), but also the topography (thus the need for a retaining wall).

NO SUBSTANTIAL DETRIMENT OR DEROGATION

There would be no substantial detriment to the public good if a variance is granted in this case. In addition, the resulting structure would not derogate from the intent or purpose of the bylaw. Rather, and to the contrary, leaving the retaining wall will not only benefit the applicants, but also the direct abutter to this property. Applicants have already secured approvals from the

Conservation Commission for the improvements, another example of how this project will not derogate from the Bylaw. Finally, this Board determined that the project would not be substantially more detrimental to the neighborhood in 2023. What detriment could there be? And if there is detriment, is it truly substantially more detrimental?

The variance criteria treat this property as if it were a bare lot. However, the quirk is that it is already improved. That is what makes this property favorable for a Variance. I think that the equities allow the issuance of a variance in this case and based on these unique circumstances.