

VILLAGE OF BAXTER ESTATES BOARD OF APPEALS

Findings of Fact and Decision  
March 27, 2024 Public Hearing

(Molis Application, 21 Locust Avenue, for  
Front Yard Impervious Surface Variance and Relief from Prior BZA  
Decision imposing landscaping maintenance condition)

WHEREAS, there has come before this Board the application (the “Application”), of Vita and Rolandas Molis, owners of premises at 21 Locust Avenue, Port Washington, NY, Residence A zoning district, Section 5, Block 10, Lot 3 on Nassau County Land & Tax Map (the “Subject Premises”), for (i) variance from **§175-18.1** of Code of Village of Baxter Estates, to permit additional paved surfaces in front yard that will result in 977 square feet of impervious surface in a front yard of 1,868 square feet (or 52%), where maximum permitted front yard impervious surface is 560.4 square feet (30% of total front yard), and (ii) in connection with the proposed construction of a rear yard deck, relief from conditions imposed by the Board of Appeals in its decision dated March 5, 2013 following a public hearing closed on November 18, 2012 (the “2013 BZA Decision”), that required the maintenance in healthy condition of plantings in the rear yard pursuant to a landscaping plan made a condition to the 2013 BZA Decision, and attached as an exhibit to the “Declaration of Covenants and Restrictions,” dated September 12, 2014, made by Richard McCabe, then-owner of the Subject Premises, in favor of the Village and recorded against the Subject Premises (the “Recorded Covenant”), requiring the maintenance of such plantings for so long as the rear yard retaining walls permitted under the 2013 BZA Decision remain on the Subject Premises; the proposed rear yard deck will interfere with the landscaping maintenance condition of the 2013 BZA Decision and the Recorded Covenant; and

WHEREAS, the Board has duly conducted a hearing with respect to said Application at which all parties in interest were given an opportunity to be heard; and

WHEREAS, the residential area variance Application, a Type II action for purposes of the New York State Environmental Quality Review Act (“SEQRA”), was submitted to the Nassau County Planning Commission (the “NCPC”), as required by law, and, as the NCPC has not notified the Village of any objections or modifications within the time frame applicable under the NCPC’s referral stream-lining rules, this Board may take such action as it deems appropriate; and

WHEREAS, the members of the Board have inspected the Subject Premises and have carefully reviewed the Application and all matters offered in support thereof and in opposition thereto; and

WHEREAS, the Board has made the following findings of fact:

1. The Subject Premises occupy an interior lot in a residential neighborhood within the Village, with frontage on Locust Avenue to the south.

2. The Applicants appeared at the hearing with their architect, Donald Sclare, to present their Application. The only other attendee in the audience to speak on the Application was Laura Kimeldorf, owner of the abutting residential premises at 23 Locust Avenue.

3. With respect to the proposed construction of a rear yard deck, the Board notes that the 2013 BZA Decision was the culmination of several years of Village interaction with a predecessor owner of the Subject Premises, centered upon the unlawful construction of a series of gabion retaining walls in the rear (northerly) yard of the Subject Premises, in conjunction with a similar, connected project by the predecessor owner of 23 Locust Avenue. The applicable Village Boards, including this Board, granted the approvals to legalize that project, which altered what had been a steep hill running from the rear of the homes at the Subject Premises and 23 Locust Avenue, down toward their respective rear northerly property lines, shared with the premises at the bottom of that hill known as 5 Tianderah Road. The steep slope was transformed by three sets of gabion retaining walls set back from each other. The then owner of 5 Tianderah, as well as many other Village residents, expressed strong opposition to that project, based upon concerns as to slope stability and aesthetics.

4. The Board recognizes that the intervening decade has seen the growth of planned vegetation in the rear yards of the Subject Premises and 23 Locust, as well as the change of ownership of the Subject Premises, 23 Locust and 5 Tianderah Road, with the three new owners taking title to their properties with the gabion retaining wall system and associated plantings in place. The Board notes that the current owner of 5 Tianderah Road joins 7 other neighbors of the Applicants in providing written support for the Application, including the proposed rear yard deck extending to the top of the highest (southernmost) of the three retaining walls (the "Top Wall").

5. The Applicants seek to obtain additional outdoor living space in a rear yard that is mostly unusable due to the slope and retaining wall system. The Applicant presented to the Board an opinion letter of Sean P. Cunningham, P.E., opining that the retaining wall system is in good condition and effective for retaining the slope, and that the loss of any vegetation in connection with the proposed deck will not affect the condition of the retaining wall system.

6. When reflecting upon the neighbors' and community concerns of slope stability that were central to the 2013 Decision, the Board finds that the engineer's report, the decade of assimilation of the retaining wall system and plantings, and the support of the present neighbors most impacted, demonstrate that there will be no apparent adverse impact upon the neighbors or the community if the portion of the Application relating to the rear yard deck is approved, including the loss of those plantings that are part of the required landscaping condition in the 2013 BZA Decision, and the Recorded Covenant and that will be impacted by the placement of the proposed deck to the south of, and up to, the Top Wall.

7. With respect to that portion of the Application that seeks variances to permit front yard impervious surface of 52% of front yard area, where the maximum permitted is 30%, the Applicant's stated purpose is to establish outdoor, front yard living space to facilitate socializing with neighbors, to relocate walkways that were built to accommodate a front entry

way that has since been relocated, and to accommodate on-site parking for 3 cars (one in the garage and two on the driveway).

8. The Board finds that the variance sought is excessive, and that the Applicants and their architect have not adequately addressed the possibility that there are feasible alternatives to what the Board finds to be a very substantial variance.

9. The Board expressed a concern with the creation of a ‘parking lot’ appearance, with minimal planting and lawn area, all of which would adversely impact the environmental conditions of the immediate neighborhood.

10. The Board understands that conditions on some lots in the immediate neighborhood contain excessive amounts of front yard impervious surface, whether as pre-existing, non-conforming conditions or based upon variances granted. The Board also understands that several neighbors on Locust Avenue expressed support in writing for the Application, with next door neighbor Laura Kimeldorf, 23 Locust Avenue, testifying her support for the front yard impervious surface variance, provided that the impervious surface propose is not all black asphalt.

11. Nevertheless, the Board finds that consideration for future neighbors, as well as the community at large, are part of the Board’s obligation as it applies the balancing test set forth in Article 7 of the New York State Village Law. The Board finds that any current conditions of excess front yard impervious surface on neighboring parcels serve to demonstrate the adverse impact thereof, so that any relevance of same as precedent to grant the Application is outweighed by the adverse impact that will result by granting the front yard impervious surface variance now before the Board.

12. The Board addressed with the Applicants the possibility of the withdrawal of that portion of the Application seeking the front yard impervious surface variance, or the adjournment of the entire Application to enable the Applicants to submit an amended plan for the front yard impervious surface variance, responding to the Board’s expressed concerns. However, the Applicants elected to have the Board render its decision on both aspects of the Application as presented.

13. The Board finds that the benefits sought by the Applicants in the front yard impervious surface variance may be achievable without the variance sought, which the Board finds is substantial under the circumstances described herein.

14. The Board finds that the front yard impervious surface variance as proposed is not necessary to accomplish the stated objectives.

15. The Board finds that any adverse impacts upon the community and the neighbors created by the front yard impervious surface variance outweigh the benefits to the Applicants.

16. The Board recognizes that the difficulty confronted by the Applicants, an inability to construct the proposed alteration without obtaining the zoning variance sought, can

be deemed self-imposed on the basis that they acquired the Subject Premises when the applicable zoning restrictions were already in place. Nevertheless, the Board notes that that is merely one of the factors considered by the Board in rendering a decision on a variance application.

17. The Board notes that it is in no way bound by the support or objection of adjacent neighbors with respect to an application, and the Board deems its function to involve protecting the community at large, as well as adjacent neighbors, and those who will become neighbors in the future.

NOW, THEREFORE, based upon the foregoing findings of fact, this Board has determined to consider separately the two aspects of the Application, one being the request for relief from the landscaping condition in the 2013 BZA Decision, and the other, the front yard impervious surface variance; as such, the Board resolves as follows:

A. Relief from Landscaping Condition in the 2013 BZA Decision. The Board finds that the detriment to the Applicants, if relief from the landscaping condition in the 2013 BZA Decision is denied, outweighs any potential adverse impact upon the adjacent property owners and the community if such relief were to be granted with certain conditions, and, therefore, it is the determination of this Board that the portion of the Application seeking relief from the landscaping condition in the 2013 BZA Decision be granted upon the following conditions:

1. All construction and installation in connection with the rear yard deck project presented in this Application shall be subject in all respects to the approvals of the Building Department of the Village and, furthermore, shall be effected substantially in accordance with all of the plans submitted by the Applicants to this Board, which are more particularly identified as “Proposed Rear Yard Deck for The Molis Residence, 21 Locust Avenue, Port Washington, New York 11050,” dated “January 3, 2024,” comprised of four sheets, drawings A-01 through A-04; prepared by Donald and Liisa Sclare Architects, and Structural Engineer Sean P. Cunningham, P.E., P.C.; provided, however, that only those portions of said plans that pertain to the Rear Yard Deck shall be deemed approved hereby, and all portions thereof that pertain to any front yard impervious surface are deemed deleted from the approval herein granted and the condition hereby imposed, and the Applicants shall cause their design professionals to submit revised drawings reflecting the deletion thereof, satisfactory to the Village Superintendent of Buildings; the plans, as so revised, are hereinafter referred to as the “Amended Plans.”
2. The landscaping condition in the 2013 BZA Decision is deemed modified and amended to delete therefrom the obligation to maintain those plantings that are required to the extent same are placed to the

south of the High Wall, with all other aspects of such condition deemed ratified, confirmed and continued.

3. All plantings required under the landscaping condition in the 2013 BZA Decision to be planted and maintained in that portion of the rear yard that extends from the northerly edge of the proposed rear yard deck to the northerly property line shall be maintained, and to the extent any thereof are damaged, shall be replaced and maintained, for so long as the rear yard deck permitted hereby remains on the Subject Premises.
4. The Applicant shall submit a revised landscaping drawing reflecting the foregoing, revised to the satisfaction of the Village Superintendent of Buildings in order to reflect the foregoing, to be appended to this decision and to the building permit issued by the Superintendent of Buildings for the rear yard deck project (the “Amended Landscaping Plan”).
5. The relief from the landscaping condition in the 2013 BZA Decision is granted only to the extent specifically described in the foregoing conditions. Such relief shall not be deemed to permit any construction at any time without a new variance application and prior approval of this Board, unless such construction fully complies in all respects with either (a) the then-existing zoning ordinance of the Village, without giving effect to any impact on such compliance created by the relief now granted, or (b) each condition set forth above, including, but not limited to, the specific Amended Plans and Amended Landscaping Plan referred to herein.

B. Front Yard Impervious Surface Variance. The Board finds that the detriment to the Applicants, if relief from the landscaping condition in the 2013 BZA Decision is denied, is outweighed by the potential adverse impact upon the adjacent property owners and the community if such relief were to be granted, and, therefore, it is the determination of this Board that the portion of the Application seeking front yard impervious surface variance be and it hereby is denied in all respects.

Board of Appeals of the Village of Baxter Estates

By: \_\_\_\_\_  
William Haagenson, Chairman

Date: \_\_\_\_\_