

BEFORE THE BOARD OF ADJUSTMENT OF SUSSEX COUNTY

IN RE: FONTANA RESIDENCE TRUST (Case No. 10937)

A hearing was held after due notice on February 6, 2012. The Board members present were: Mr. Jeff Hudson, Mr. John Mills, Mr. Norman Rickard, and Mr. Brent Workman.

Nature of the Proceedings

This is an application for a variance of the maximum height requirement and / or a reversal of the denial of the Certificate of Compliance by the Sussex County Planning & Zoning Department.

Findings of Fact

The Board found that the Applicant was seeking a variance of 1.22 feet from the 42 foot maximum height requirement to enclose a widow's walk with a roof. In the alternative, the Applicant seeks a reversal of the denial of a Certificate of Compliance by the Sussex County Planning & Zoning Department. The Applicant has requested that the aforementioned requested variance be granted as it pertains to certain real property located east of Route 1 (Coastal Highway) northeast of Seaside Drive, being Lot 11 within Bethany Village development; said property being identified as Sussex County Tax Map Parcel Number 1-34-9.00-459.00. After a hearing, the Board made the following findings of fact:

1. Mr. Rickard abstained from hearing the case since he was previously a Zoning Inspector and he has prior knowledge of this property.
2. Dennis Schrader, Attorney, was present on behalf of the Applicant. Gabriel Fontana and Ken Lloyd, builder of the structure, testified on behalf of the Applicant.
3. The Board found that the Applicant submitted a large packet of information in support of the Application.
4. The Board found that the Property has a history of litigation including a 1997 Court of Chancery case between the Applicant and the Bethany Village Owners Association which involved the height of the structure on this Property and private deed covenants. In that case, the Court ruled that the private deed covenants were vague and unenforceable.
5. The Board found that the Applicant testified that he previously constructed a widow's walk at the top of the dwelling in the early 1990s and that the widow's walk was enclosed by a roof.
6. The Board found that the Applicant presented evidence that in 2010 he sought to replace the existing widow's walk with a new structure that would be the same height as the prior widow's walk but the enclosed area would be wider and have a different roof pitch.
7. The Board found that the Applicant testified that he submitted plans to the County for a building permit that showed the proposed height of the roof structure to be the same height as the existing roof structure.
8. The Board found that Mr. Lloyd testified that he built the new structure at the same height as the previous widow's walk.
9. The Board found that the Applicant testified that the widow's walk consists of a stairway in the center with a three (3) foot walkway for sightseeing only and is not an area used for living space.
10. The Board found that the Applicant testified that the prior widow's walk had a small enclosure around the staircase and a short outside wall for a walkway around the staircase that was not enclosed. The Applicant testified that drainage

issues existed in the unenclosed area due, at least in part, to birds that clog the drainage holes on the walkway.

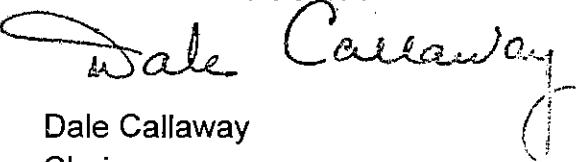
11. The Board found that the Applicant testified that the new widow's walk encloses the walkway around the staircase at the location of the short outside wall on the prior widow's walk and that the pitch of the roof has been changed.
12. The Board found that the Applicant testified that the change to the roof structure was made to prevent water from pooling on the roof and to prevent birds from clogging the holes used for drainage.
13. The Board found that the Applicant testified that the variance sought is the minimum to enclose the widow's walk completely, that the new roof has less pitch than the prior roof, that the proposed widow's walk does not alter the character of the neighborhood and that it is the minimum variance to afford relief.
14. The Board found that Mike Johnson testified in opposition to the Application and that he is on the Board of Directors for Bethany Village.
15. The Board found that Mr. Johnson testified that he purchased his property in Bethany Village in 1989 and served on the Board of Directors of the Bethany Village Owners Association during the Chancery Court litigation. He testified that he does not argue any of the prior court decisions.
16. The Board found that Mr. Johnson believes that the new widow's walk is much larger than the prior structure as it is a wider structure and, thus, impacts the view of neighbors. Mr. Johnson further testified that, although the height of the structure has not increased, a greater portion of the widow's walk is now above the maximum height requirement.
17. The Board found that Mr. Johnson testified that the Applicant did not seek approval from the Board of Directors of the Bethany Village Owners Association for the new structure.
18. The Board found that Mr. Johnson testified that he would not object to a widow's walk of the same size of the old widow's walk.
19. The Board found that Mr. Johnson submitted 16 letters in opposition to the Application.
20. The Board found that no parties appeared in support of the Application.
21. The Board found that one party appeared in opposition to the Application.
22. The Board tabled its decision on this Application until its meeting on February 20, 2012.
23. At the February 20, 2012, meeting, the Board discussed the case. Mr. Dale Callaway, who was not in attendance at the February 6, 2012, meeting advised the Board that he had listened to the audio tapes of the February 6, 2012 hearing and he had reviewed the documents in the public record.
24. The Board tabled its decision on this Application until its meeting on March 5, 2012.
25. At the March 5, 2012, meeting, the Board discussed this case.
26. Based on the findings above and the testimony presented at the public hearing and the public record, the Board determined that the application met the standards for granting a variance. The Property is unique. The height of the structure is the same as the previous structure which had been approved in 1994. The difficulty was not caused by the Applicant as nature created the drainage problems on the structure. The variance sought is the minimum to afford relief and will not alter the essential character of the neighborhood. The variance is needed to enable reasonable use of the property.
27. The Board found that because the variance application had been granted, the Applicant's appeal of the decision of the Planning & Zoning Department to deny the Certificate of Compliance was moot.

The Board granted the variance application finding that it met the standards for granting a variance.

Decision of the Board

Upon motion duly made and seconded, the application was granted. The Board Members in favor were Mr. Dale Callaway, Mr. Jeff Hudson, Mr. John Mills, and Mr. Brent Workman. Mr. Norman Rickard abstained from participation in the hearing, deliberation and decision of this Application. No Member voted against the Application.

BOARD OF ADJUSTMENT
OF SUSSEX COUNTY


Dale Callaway
Chairman

If the use is not established within one (1)
year from the date below the application
becomes void.

Date April 3, 2012