

BEFORE THE BOARD OF ADJUSTMENT OF SUSSEX COUNTY

IN RE: MICHAEL KELLY

(Case No. 11584)

A hearing was held after due notice on June 8, 2015. The Board members present were: Mr. Dale Callaway, Mr. Jeff Hudson, Mr. John Mills, and Mr. Brent Workman.

Nature of the Proceedings

This is an application for variances from the front yard, side yard, and rear yard setback requirements.

Findings of Fact

The Board found that the Applicant was seeking a variance of four (4) feet from the five (5) feet front yard setback requirement for a proposed attached garage, a variance of ten (10) feet from the ten (10) feet side yard setback requirement for existing HVAC, landing, deck, and steps, and a variance of twenty (20) feet from the twenty (20) feet rear yard setback requirement for an existing deck. This application pertains to certain real property located on the west side of Tyler Avenue approximately 370 feet south of Lincoln Drive (911 Address: 38772 Tyler Avenue, Selbyville); said property being identified as Sussex County Tax Map Parcel Number 5-33-20.14-39.00.

1. The Board was given copies of the Application, minutes of the Board meeting from April 3, 2000, a variance application number 7112, a property record card, a portion of the tax map of the area, and an undated survey of the Property.
2. The Board found that the Office of Planning & Zoning had not received any correspondence in support of or in opposition to the Application.
3. Michael Kelly was sworn in to testify about the Application. Mr. Kelly submitted pictures to the Board to review.
4. The Board found that Mr. Kelly testified that he purchased the Property in 2013. The Property is located in Cape Windsor.
5. The Board found that Mr. Kelly testified that most lots in the development measure 50 feet by 90 feet and that his lot measures 50 feet by 88 feet.
6. The Board found that Mr. Kelly testified that the size of his lot creates a unique situation.
7. The Board found that Mr. Kelly testified that he needs additional space for storage.
8. The Board found that Mr. Kelly testified that the previous owner built the dwelling in 2001. The prior owner was a single man and he did not need as much storage space as the Applicant requires.
9. The Board found that Mr. Kelly testified that an exceptional practical difficulty exists.
10. The Board found that Mr. Kelly testified that the proposed attached garage will provide much needed storage and the garage must be 12 feet wide to fit a vehicle. The garage will measure 12 feet by 24 feet.
11. The Board found that Mr. Kelly testified that the variances are necessary to enable reasonable use of the Property.
12. The Board found that Mr. Kelly testified that he plans to store a vehicle and the family's larger recreational items in the garage.
13. The Board found that Mr. Kelly testified that the variances will not alter the character of the neighborhood. There are other similar structures in the neighborhood.

14. The Board found that Mr. Kelly testified that the proposed garage will not impact any utility access.
15. The Board found that Mr. Kelly testified that variances will not permanently impair the use or development of neighboring properties.
16. The Board found that Mr. Kelly testified that the existing shed will be removed as it is in disrepair.
17. The Board found that Mr. Kelly testified that the Homeowners Association has no objection to the Application.
18. The Board found that Mr. Kelly testified that the use will not be detrimental to the public welfare.
19. The Board found that Mr. Kelly testified that the variances are the least modifications of the regulations at issue.
20. The Board found that Mr. Kelly testified that the dwelling is 26 feet wide.
21. The Board found that Mr. Kelly testified that the dwelling will be used as a vacation home but they intend to leave a car at the Property year-round and will place the car in the garage.
22. The Board found that Mr. Kelly testified that the deck, porch, and HVAC existed on the lot at the time he purchased the Property.
23. The Board found that one (1) party appeared in support of the Application.
24. The Board found that no parties appeared in opposition to the Application.
25. The Board tabled its decision until June 22, 2015, at which time the Board reviewed and discussed the Application. Board Member Norman Rickard, who reviewed the public record and listened to the testimony, participated in the discussion and vote of the Application.
26. Based on the findings above and the testimony and evidence presented at the public hearing and the public record, the Board determined that the application for the side yard and rear yard variances for the existing steps, deck, and HVAC system met the standards for granting a variance but the application for a front yard variance for a proposed garage did not meet the standards for granting a variance. The findings below further support the Board's decision to approve the Application in part and to deny the Application in part.
 - a. The Property is unique due to its small size. The Property is narrow and is located adjacent to a lagoon. The unique characteristics of this Property limit the buildable area available to the Applicant upon which to place a deck, steps, and HVAC system and have created an exceptional practical difficulty for the Applicant. The uniqueness of the Property is evident when reviewing the survey submitted by the Applicant.
 - b. Due to the uniqueness of the Property, the Property cannot be developed with a deck, steps, and HVAC system in strict conformity with the Sussex County Zoning Code. The Applicant seeks the requested variances in order to retain the existing deck, steps, and HVAC system on the Property, which all existed on the Property at the time the Applicant purchased the lot. Those structures, which are not unreasonable in a waterfront community such as Cape Windsor, cannot be placed elsewhere on the Property due to the unique size of the Property. The small size of the lot greatly limits the building envelope from which the Applicant can locate those structures. The Board is convinced that the side and rear yard variances are necessary to enable the reasonable use of the Property. The Board is convinced that the shape and location of the deck, steps, and HVAC system are also reasonable; which is confirmed when reviewing the survey. As noted on the survey, the deck height varies from 6 inches to 1 foot above grade and, if the deck was below 6 inches tall, no variance would be necessary. Meanwhile, the steps provide a reasonable access to the deck.

- c. The Board, however, was not convinced that the variance requested for the proposed garage was thus necessary to enable reasonable use of the Property. The Applicant proposes to use the shed for storage of a vehicle and other belongings. The Board was not convinced that the garage, which is a new structure, was needed by the Applicant as there is space on the Property to park a car and to place a shed which would fit the Applicant's belongings. In fact, the Applicant is removing a shed which could be used for storage. No evidence was presented which convinced the Board that the Applicant could not find other ways to store its belongings on the Property in a manner which complies with the Sussex County Zoning Code. The Board was also not convinced that a garage to store a vehicle was needed in order to reasonably use the Property.
- d. The exceptional practical difficulty for the existing deck, steps, and HVAC system was not created by the Applicant. The Applicant did not create the unusual size of the Property and the limited building envelope of the Property has created an exceptional practical difficulty. More importantly, however, the deck, steps, and HVAC system were placed on the Property by a prior owner and the Applicant purchased the Property with those structures in their current location. The Board is convinced that the exceptional practical difficulty for the side and rear yard variances was not created by the Applicant but was created by the size of the lot and the placement of those structures by the prior owner.
- e. In regards to the variance for the proposed garage, the Board finds that the exceptional practical difficulty was created by the Applicant. The Property clearly has enough space to park vehicles and the Board is not convinced that the Applicant could not construct a shed which would provide him with needed storage while complying with the Sussex County Zoning Code. The dwelling is 18.6 feet from Lot 44 which would provide the Applicant with space to construct a reasonably sized shed or addition to store its belongings.
- f. The variances for the deck, steps and HVAC will not alter the essential character of the neighborhood nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare. The Board is convinced that those structures will not have a negative impact on the neighborhood. The structures have been in their present locations since prior to the Applicant's purchase of the Property in 2013 and no complaints have been noted in the record. The deck is only minimally above grade and the stairs leading to the deck and the HVAC system likely have a minimal impact on any neighboring property. Ultimately, no evidence was presented which would indicate that the side and rear yard variances would somehow alter the essential character of the neighborhood or be detrimental to the public welfare.
- g. The Board was concerned about the impact of the proposed garage on the neighborhood. While the Applicant submitted photographs of other properties in the neighborhood, the other structures did not appear to be nearly as close to Tyler Avenue as proposed by the Applicant nor did the photographs indicate that a garage was placed so close to Tyler Avenue. Rather the photographs indicated that sheds have been placed in the front yard. The Board finds that the proposed garage would have a negative impact on the neighborhood and would likely encourage others to apply for similar variances. The Board is particularly concerned about the proximity of the proposed garage to Tyler Avenue and its potential effect on traffic and safety in the neighborhood. Ultimately, the Board finds that the garage would alter the essential character of the neighborhood.

- h. The side and rear yard variances sought are the minimum variances necessary to afford relief and the variances requested represent the least modifications possible of the regulations at issue. The Applicant has demonstrated that the variances sought will allow for the existing deck, steps, and HVAC system as shown on the survey to remain in their present locations and that no additional variances are being requested for those structures.
- i. The Board was not persuaded that the variance requested for the garage was the minimum variance necessary to afford relief. As previously noted, the Board was not convinced that a shed for storage of personal belongings could not be placed elsewhere on the Property in compliance with the Sussex County Zoning Code. Such a shed would certainly afford the Applicant with some of the relief requested. Furthermore, a review of the survey indicates that the dwelling is 18.6 feet from the side yard and the proposed garage is 12 feet wide. While a side yard variance would still be necessary for a garage built in the side yard, the size of the side yard variance for a garage would certainly be less than the size of the variance requested for the front yard as proposed. Ultimately, the Board was not convinced that a variance of any kind was necessary for the garage; let alone the variance requested.

The Board granted the variance application in part and denied the variance application in part finding that the side yard and rear yard setback variance requests met the standards for granting a variance but the front yard setback variance request did not meet the standards for granting a variance.

Decision of the Board

Upon motion duly made and seconded, the variance application was approved in part and denied in part. The Board Members in favor were Mr. Dale Callaway, Mr. Jeff Hudson, Mr. John Mills, Mr. Norman Rickard, and Mr. Brent Workman. No Board Members voted against the Motion to approve the variance application in part and to deny the variance application in part.

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 August 4, 2015.