

BEFORE THE BOARD OF ADJUSTMENT OF SUSSEX COUNTY

IN RE: DAVID W. SMITH & CAROLYN E. SMITH

(Case No. 11650)

A hearing was held after due notice on October 5, 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 side yard setback requirements.

Findings of Fact

The Board found that the Applicants are seeking a variance of 8.1 feet from the ten (10) feet side yard setback requirement on the west side and a variance of seven (7) feet from the ten (10) feet side yard setback requirement on the east side for a proposed dwelling. This application pertains to certain real property located on the southeast side of Smiths Landing approximately 135 feet south of Oak Orchard Road (911 Address: 28590 Smith Landing, Millsboro); said property being identified as Sussex County Tax Map Parcel Number 2-34-35.05-121.00.

1. The Board was given copies of the Application, plans and pictures of the proposed dwelling, the findings of fact for Case No. 9095-2005, a survey of the Property dated November 16, 2004, 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 received had not received any correspondence in support of or in opposition to Application.
3. David Smith and Carolyn Smith were sworn in to testify about the Application.
4. The Board found that Mr. Smith testified that the Applicants own an odd shaped lot in Oak Orchard which was purchased in 2005.
5. The Board found that Mr. Smith testified that the existing dwelling was in poor shape and the Board granted the Applicants a variance in 2005 to replace the dwelling with a new structure to be built in the same footprint as the existing dwelling. Due to the shift in the economy, they never built the new dwelling and the original variance approval is no longer valid.
6. The Board found that Mr. Smith testified that the Applicants live on a nearby property.
7. The Board found that Mr. Smith testified that houses in the neighborhood do not comply with the Sussex County Zoning Code.
8. The Board found that Mr. Smith testified that the proposed two (2) story dwelling will be on pilings to raise the dwelling above the flood zone. The proposed dwelling will cantilever approximately two (2) feet over the pilings. The dwelling can be constructed without trespassing on the neighboring lots.
9. The Board found that Mr. Smith testified that the proposed dwelling is closer to one side of the lot to leave access for pedestrians on the opposite side of the lot.
10. The Board found that Mr. Smith testified that the proposed dwelling can be reduced in size.
11. The Board found that Mr. Smith testified that the Property is unique.
12. The Board found that Mr. Smith testified that the difficulty was not created by the Applicants.
13. The Board found that Mr. Smith testified that the variances will not alter the character of the neighborhood.
14. The Board found that Mr. Smith testified that the variances requested are the minimum variances to afford relief.

15. The Board found that Mrs. Smith testified that the Property is in a flood zone.
16. The Board found that Mrs. Smith testified that the Applicants intend to build a new dwelling on the lot and sell the Property to a new buyer.
17. The Board found that Mrs. Smith testified that the lots in the neighborhood are very narrow.
18. The Board found that Mrs. Smith testified that the buyer wants to set the dwelling far enough away from the water so as to not block any views of neighboring properties.
19. The Board found that Mrs. Smith testified that the dwelling will be set in a manner similar to other dwellings in the area.
20. The Board found that Mrs. Smith testified that there are vacant properties on both sides of the lot.
21. The Board found that Mrs. Smith testified that a deeded easement gives access to the Property.
22. The Board found that Cindy Battles was sworn in and testified in opposition to the Application. She owns an adjacent property and has concerns with the drainage and flooding issues in the area. She is also concerned about the height of the grade under the proposed dwelling and that the proposed dwelling seems large for the area.
23. The Board found that Ms. Battles testified that other houses in the area are located near property lines as well and that another property she owns nearby is only 39 feet wide.
24. The Board found that Mike Koly was sworn in and testified in opposition to the Application. He expressed concerns with the flooding issues in the area and he testified that the proposed dwelling is too large for the lot. He feels a smaller dwelling would be more suitable for the area.
25. The Board found that Mr. Smith testified that the dwelling will not increase the flooding issues in the area.
26. The Board found that Patricia Ferrier, Robert Ferrier and Karen Donovan were sworn in and testified in opposition to the Application.
27. The Board found that Ms. Donovan testified that Patricia Ferrier and Robert Ferrier are her parents and they own the adjacent property. The Applicants own property on the other side of their property and the improvement on that property is only a few inches from their property line.
28. The Board found that Ms. Donovan testified that they are concerned these variances will compromise their property.
29. The Board found that Mrs. Ferrier submitted a survey of her family's property.
30. The Board found that Mrs. and Mr. Ferrier testified that they are opposed to this Application.
31. The Board found that no parties appeared in support of the Application.
32. The Board found that five (5) parties appeared in opposition to the Application.
33. 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 met the standards for granting a variance. The findings below further support the Board's decision to approve the Application.
 - a. The Property is unique due to its unique size. The Property is very narrow as evidenced by the survey. The Property is only 29.53 feet wide in the front and slightly wider in the rear yard. The unique characteristics of this Property limit the buildable area available to the Applicants and have created an exceptional practical difficulty for the Applicants who seek to build a dwelling on the lot. A dwelling was previously located on the lot but that dwelling also did not comply with the Sussex County Zoning Code.

- b. Due to the uniqueness of the lot, the Property cannot be developed in strict conformity with the Sussex County Zoning Code. The Property has a unique size and the buildable area thereof is limited due to its size. The Applicants seek to construct a dwelling on the Property but are unable to do so without violating the Sussex County Zoning Code. The Board is convinced that variances of the side yard setback requirements are necessary to enable the reasonable use of the Property as the variances will allow a reasonably sized dwelling to be constructed on the Property.
- c. The exceptional practical difficulty was not created by the Applicants. The Applicants did not create the unusual size of the Property. The unique lot size has resulted in a limited building envelope on the Property and the small building envelope has created the exceptional practical difficulty.
- d. The variances 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 a dwelling will have no effect on the character of the neighborhood. Neighbors raised concerns about the possible effects of flooding due to the location of the dwelling but no evidence was submitted which convinced the Board that the existence or non-existence of a dwelling on the Property would have an effect on the flooding issues in the neighborhood. Rather, testimony from neighbors confirms that other homes in the neighborhood do not comply with the Sussex County Zoning Code and the Board was not swayed by the opposition that a dwelling on the Property would somehow alter the essential character of the neighborhood or be detrimental to the public welfare.
- e. The Board, however, was not convinced that the variances sought are the minimum variances necessary to afford relief and that the variances requested represent the least modifications possible of the regulations at issue. While it is clear to the Board that side yard variances are needed to afford the Applicants with relief to construct a dwelling on the Property, the size of the variances sought by the Applicants are not the minimum variances necessary to afford relief. As noted by the Applicants, a dwelling was previously located on the Property but had to be demolished due to disrepair. The Applicants obtained variances from the side yard setback requirements to replace that dwelling with a dwelling on the same footprint in 2005 but the variances expired when the new dwelling was not constructed. The variances granted by the Board allowed for a 4.7 feet variance on the west side and a 7.7 feet variance on the east side. The Applicants testified that they could build a dwelling on that footprint. As such, modifications of the variance requests are appropriate and the Board grants the variance application with the modification that the side yard variances granted are 4.7 feet on the west side and 7.7 feet on the east side.

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

Decision of the Board

Upon motion duly made and seconded, the variance application was approved with modifications. The Board Members in favor were Mr. Dale Callaway, Mr. Jeff Hudson, Mr. John Mills, and Mr. Brent Workman. No Board Member voted against the Motion to approve the variance application. Mr. Norman Rickard was not present and did not participate in the discussion or vote of this 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 November 17, 2015.