

**BEFORE THE BOARD OF ADJUSTMENT OF SUSSEX COUNTY**

**IN RE: UPESCH VYAS**

**(Case No. 11739)**

A hearing was held after due notice on March 21, 2016. The Board members present were: Mr. Dale Callaway, Mr. John Mills, Mr. Jeff Hudson, Mr. Norman Rickard, and Mr. Brent Workman.

Nature of the Proceedings

This is an application for variances from the front yard setback requirement.

Findings of Fact

The Board found that the Applicant is seeking a variance of eighteen (18) feet from the sixty (60) feet front yard setback requirement from Route 5 (Indian Mission Road) and a variance of eighteen (18) feet from the sixty (60) feet front yard setback requirement from Route 24 (John J. Williams Highway) for a proposed building, a variance of 58.9 feet from the sixty (60) feet front yard setback requirement and variance of 56.3 feet from the sixty (60) feet front yard setback requirement for an existing canopy. This application pertains to certain real property located on the northwest corner of John J. Williams Highway and Indian Mission Road (911 Address: 24858 John J. Williams Highway, Millsboro); said property being identified as Sussex County Tax Map Parcel Number 2-34-23.00-269.08.

1. The Board was given copies of the Application, a site plan of the Property, a survey of the Property dated August 6, 2015, a proposed floor plan of the store, and a portion of the tax map of the area.
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. The Board found that James Robert Clark and Upesch Vyas were sworn in to testify about the Application.
4. The Board found that Mr. Clark testified that the Property is irregularly shaped.
5. The Board found that Mr. Clark testified that the existing canopy and building have been on this property for many years. The Applicant purchased the Property in 2002 as it currently exists
6. The Board found that Mr. Clark testified that the Delaware Department of Transportation ("DelDOT") took a portion of the Property when widening the intersection.
7. The Board found that Mr. Clark testified that the Property is of little value if the variances are not approved and the new store is needed to enable reasonable use of the Property.
8. The Board found that Mr. Clark testified that the existing store is quite small and the new store will be larger.
9. The Board found that Mr. Clark testified that the difficulty was not created by the Applicant.
10. The Board found that Mr. Clark testified that the variances will not alter the essential character of the neighborhood. The Property is zoned commercial and the surrounding properties are also commercially zoned.
11. The Board found that Mr. Clark testified that the existing building has been on the Property for approximately 35 years and will be removed.
12. The Board found that Mr. Clark testified that the existing underground pumps cannot be relocated and the proposed building will cantilever over the existing underground pumps. The Property is being developed around the existing storage tanks as it would be cost prohibitive to move the tanks.

13. The Board found that Mr. Clark testified that there will be adequate parking available.
14. The Board found that Mr. Clark testified that the Applicant will be removing egress access from Route 24 and Route 5. Traffic will have to use an access from the existing shopping center parking lot.
15. The Board found that Mr. Clark testified that the proposed store will be selling liquor and an entrance to their property must be 0.9 miles from any other liquor store in the area.
16. The Board found that Mr. Vyas testified that DelDOT took a portion of the Property.
17. The Board found that one (1) party appeared in support of the Application.
18. The Board found that no parties appeared in opposition to the Application.
19. The Board tabled the discussion and vote on this application until April 4, 2016.
20. Based on the findings above and the testimony and evidence presented at the public hearing and the public record, which the Board found credible, persuasive, and un rebutted, 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 as it is irregularly shaped with road frontages on two roads. The Property is also unique as it houses underground storage tanks which cannot be moved. These conditions greatly restrict the building envelope on the Property. Consequently, the Applicant has limited area where he can place a new store with canopy. It is clear to the Board that the lot's unique characteristics have created an exceptional practical difficulty for the Applicant who seeks to build a new store and retain an existing canopy on the lot. The Board also notes that a portion of the front yard was removed by DelDOT thereby further limiting the available building envelope on the lot.
  - b. Due to the uniqueness of the lot, the Property cannot be developed in strict conformity with the Sussex County Zoning Code. The Property is bordered on two sides by roads and houses existing underground storage tanks which cannot be relocated. The Applicant seeks to build a store of a reasonable size and to retain an existing canopy but is unable to do so without violating the Sussex County Zoning Code. The Board is convinced that the variances are necessary to enable the reasonable use of the Property as the variances will allow the Applicant to build a reasonably sized store and to retain an existing canopy on the Property. The Board is convinced that the shape and location of the building and canopy are also reasonable, which is confirmed when reviewing the survey provided by the Applicant.
  - c. The exceptional practical difficulty was not created by the Applicant. The Applicant did not create the size of the lot or place the underground storage tanks on the lot; all of which limit the building envelope on the Property. The building envelope was further limited by the removal of portions of the Property by DelDOT. The unique characteristics of the Property are clear when reviewing the survey. The Board is convinced that the exceptional practical difficulty was not created by the Applicant but was created the lot's unique characteristics. The Applicant also did not place the canopy on the lot.
  - 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 the new store and the existing canopy will have no effect on the character of the neighborhood. The current canopy

and store have been on the Property for many years without a complaint noted in the record. The new store, while larger than the existing store, will not alter the character of the neighborhood. The surrounding area consists of commercial uses and the store will be consistent with those uses and the historical use of the Property. The Board was not convinced that a larger store on the Property would have any negative impact on the neighborhood. Furthermore, no evidence was presented which would indicate that the variances would somehow alter the essential character of the neighborhood or be detrimental to the public welfare.

- e. The variances sought are the minimum variances necessary to afford relief and the variances requested represent the least modifications possible of the regulation at issue. The Applicant has demonstrated that the variances sought will allow the Applicant to retain existing canopies over gas pumps and to construct a new store on the Property. The Board is convinced that the Applicant has taken appropriate measures to limit the intrusion of these structures into the setback areas.

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 variance application was approved. The Board Members in favor were Mr. Dale Callaway, Mr. Norman Rickard, and Mr. Brent Workman. Mr. Jeff Hudson and Mr. John Mills voted against the Motion to approve the variance 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 May 12, 2016