

BEFORE THE BOARD OF ADJUSTMENT OF SUSSEX COUNTY

IN RE: JOAN CLARKE

(Case No. 11796)

A hearing was held after due notice on July 11, 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, side yard, and rear yard setback requirements.

Findings of Fact

The Board found that the Applicant is seeking a variance of twenty-five (25) feet from the thirty (30) feet front yard setback requirement, a variance of five (5) feet from the ten (10) feet side yard setback requirement on the southwest side, and a variance of five (5) feet from the ten (10) feet rear yard setback requirement for a proposed dwelling. This application pertains to certain real property located on the north side of Virginia Avenue approximately 159 feet east of North Bay Shore Drive. (911 Address: 6 Virginia Avenue, Milton); said property being identified as Sussex County Tax Map Parcel Number 2-35-4.13-44.00.

1. The Board was given copies of the Application, a portion of the tax map of the area, an email from Richard Allen, pictures, a survey of the Property dated November 11, 2015, drawings of the proposed dwelling, a site evaluation plot drawing dated May 2, 2016, an email from David Warga, a letter from Byron Jefferson with documents for a septic permit application, a letter from Byron Jefferson with documents for a construction letter of approval, and a site plan of the Property dated November 11, 2015.
2. The Board found that the Office of Planning and Zoning received one (1) letter in opposition to the Application and no correspondence in support of the Application.
3. The Board found that Joan Clarke and Buddy Millman were sworn in to testify about the Application. Ms. Clarke submitted exhibits to the Board to review.
4. The Board found that Mr. Millman testified that the Applicant inherited the Property which is located in Broadkill Beach.
5. The Board found that Mr. Millman testified that the Property is unique because the existing dwelling does not comply with the setback requirements. The existing dwelling is a fire hazard and is uninhabitable.
6. The Board found that Mr. Millman testified that the existing porch is 1.5 feet from the side property line, 4.6 feet from the rear property line and 4.4 feet from the front property line. The existing site plan shows the location of the existing dwelling and porch and the encroachments that existed.
7. The Board found that Mr. Millman testified that the proposed dwelling will reduce the encroachments on all three (3) sides and will encroach less into those setback areas than the existing dwelling.
8. The Board found that Mr. Millman testified that the proposed dwelling is modest in size. The proposed two-story dwelling will measure 18 feet by 40 feet and will be on pilings to meet flood zone requirements.
9. The Board found that Mr. Millman testified that a driveway easement to the neighboring property existed prior to the Applicant's acquisition of the Property.
10. The Board found that Mr. Millman testified that the Applicant has applied for a septic permit and a construction permit from the Delaware Department of Natural Resources and Environmental Control ("DNREC").

11. The Board found that Mr. Millman testified that DNREC will not allow for a septic system to be placed within the dune line.
12. The Board found that Mr. Millman testified that it is not desirable to construct the dwelling to the east of the driveway easement located on the Property.
13. The Board found that Mr. Millman testified that DNREC prohibits the construction of a dwelling or the placement of a septic system to the northeast of the driveway. As such, the new septic system and dwelling need to be placed on the west side of the driveway. Over 50% of the Property is unable to be improved because of the dunes and the driveway easement.
14. The Board found that Mr. Millman testified that the Property cannot otherwise be developed in strict conformity with the Sussex County Zoning Code.
15. The Board found that Mr. Millman testified that the Applicant is attempting to place a dwelling and septic system in an area measuring approximately 50 feet by 50 feet inclusive of setback areas. If strictly applied, the setback requirements would limit the buildable area to 10 feet deep.
16. The Board found that Mr. Millman testified that the exceptional practical difficulty was not created by the Applicant.
17. The Board found that Mr. Millman testified that the proposed dwelling will not alter the character of the neighborhood. Rather, the dwelling will improve the character of the neighborhood and will increase property values of neighboring properties.
18. The Board found that Mr. Millman testified that other homes in the area encroach into the setback areas.
19. The Board found that Mr. Millman testified that the proposed dwelling will not be taller than other new homes in the area. The proposed decks will face the water.
20. The Board found that Mr. Millman testified that the only parking area will be under the dwelling.
21. The Board found that Mr. Millman testified that the Property is useless without variances. The Applicant looked at multiple house designs to find one to fit the lot. The septic system particularly poses a challenge because the dwelling cannot be built on the septic system and cars cannot be driven on it. The dwelling cannot be turned to better fit on the lot due to the location of the septic system.
22. The Board found that Ms. Clarke testified that she inherited the Property.
23. The Board found that Ms. Clarke testified that, over the years, portions of the Property were given away by a prior owner and the previous owners felt bullied when granting the driveway easement. The neighbors have since approached her about acquiring her property.
24. The Board found that Ms. Clarke testified that the neighbors' dwelling encroaches into the setback areas as well.
25. The Board found that Ms. Clarke testified that the driveway is right in the middle of the Property and benefits the neighbors in opposition.
26. The Board found that Ms. Clarke testified that the proposed dwelling will be safer than the existing dwelling.
27. The Board found that four (4) parties appeared in support of the Application.
28. The Board found that no parties appeared in opposition to the Application.
29. 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 variances for the dwelling met the standards for granting a variance. The findings below further support the Board's decision to approve the Application.
 - a. The Property is exceptionally unique due to its size, the location of the driveway easement, and the building restrictions set forth by DNREC. The DNREC restrictions greatly limit where the septic system can be placed as well as the location of a dwelling. These restrictions also greatly limit the buildable area of the lot and this building envelope is further limited by the existence of a driveway easement in the middle of the lot. The only area

which can be built pursuant to DNREC regulations is an area measuring approximately 50 feet by 50 feet and most of that area is unbuildable due to the setback requirements. The existing dwelling needs to be removed as it is uninhabitable – as confirmed by the pictures provided by the Applicant and the testimony of the Applicant's builder. Ultimately, the unique characteristics of this Property limit the buildable area available to the Applicant and have created an exceptional practical difficulty for the Applicant who seeks to construct a reasonably sized home 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 has a unique size and the buildable area thereof is limited due to its size as well as the DNREC requirements and the driveway easement. The Applicant seeks to construct a dwelling of a reasonable size but is unable to do so without violating the Sussex County Zoning Code. The Board is convinced that the variances for the dwelling are necessary to enable the reasonable use of the Property as the variances will allow a reasonably sized dwelling to be constructed. The Board notes that the dwelling is very modest in size and will be elevated to meet flood requirements. The elevation of the home will also allow the Applicant to park underneath the dwelling. The Board is convinced that the shape and location of this dwelling are also reasonable, which is confirmed when reviewing the survey and pictures provided by the Applicant. The neighbor in opposition argued that the Applicant could build a smaller home in compliance with the Sussex County Zoning Code but it appears impossible to the Board that a home of a reasonable size could be constructed on the lot in strict conformity with the Sussex County Zoning Code while not infringing on the driveway easement or the DNREC regulated areas. The driveway easement, which ironically benefits the neighbor in opposition, complicates and already complex and limited building envelope.
- c. The exceptional practical difficulty was not created by the Applicant. The Applicant did not create the unusual size of the Property, the driveway easement, or the DNREC regulations; all of which have resulted in a limited building envelope on the Property. The small building envelope has created the exceptional practical difficulty. Furthermore, the existing dwelling was placed on the Property by a prior owner many years ago and needs to be removed as it is dilapidated. Notably, the existing dwelling encroaches further into the setback area than the proposed dwelling. 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.
- 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 dwelling will have no effect on the character of the neighborhood. The dwelling will be in a similar location as the existing dwelling on the Property and will be constructed in a manner similar to other homes in the neighborhood. The neighbor to the northwest claims that the dwelling will alter the character of the neighborhood but the pictures evidence that the neighbor's dwelling is also close to the property line itself. Likewise, the testimony of the builder confirms that other homes in the neighborhood encroach into the setback areas. Furthermore, the need for the variance was, in part, caused by the driveway easement in the middle of the Property which greatly limits the buildable area for the Applicant. The driveway, of course, benefits the neighbor to the northwest. It is difficult to

see how the replacement of the existing, dilapidated dwelling with a modest size home of new construction consistent with other homes in the neighborhood would somehow be detrimental to the character of the neighborhood. The neighbor argues that the close proximity of the dwelling to his lot would create a potential fire hazard but the proposed dwelling will be farther away from his lot than the existing dwelling. The unrebutted testimony confirms that the existing dwelling is also a fire hazard and, it is reasonable to conclude that a new dwelling constructed to modern codes would be less of a fire hazard than what is currently on the Property. Ultimately, the Board was not convinced 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 regulations at issue. The Applicant has demonstrated that she has explored alternatives for placement of a dwelling on the lot so as to minimize the need for a variance and the proposed dwelling is the best option available to her while also minimizing the need for the variance. The Applicant even explored turning the dwelling 90 degrees but cannot do so because of the location of the septic system and the driveway easement. The proposed dwelling will also encroach less into the setback areas than the existing dwelling.

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 of the motion 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.

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 September 13, 2016.