

BEFORE THE BOARD OF ADJUSTMENT OF SUSSEX COUNTY

IN RE: JOHN ALDOCK & JUDY ALDOCK

(Case No. 11865)

A hearing was held after due notice on November 7, 2016. The Board members present were: Mr. Dale Callaway, Mr. John Mills, Mr. Jeff Hudson, and Mr. Brent Workman.

Nature of the Proceedings

This is an application for a variance from the side yard setback requirement.

Findings of Fact

The Board found that the Applicants are seeking a variance of two (2) feet from the ten (10) feet side yard setback requirement on the north side for a proposed elevator. This application pertains to certain real property located on the east side of Heather Lane in Bethany Dunes off of Coastal Highway (911 Address: 30994 Heather Lane, Bethany Beach); said property being identified as Sussex County Tax Map Parcel Number 1-34-9.00-426.00.

1. The Board was given copies of the Application, drawings of the proposed addition, a survey of the Property dated September 15, 2006, an aerial photograph of the Property, and a portion of the tax map.
2. The Board found that the Office of Planning & Zoning no correspondence in support of the Application and one (1) letter in opposition to the Application.
3. The Board found that John Aldock & Judy Aldock were sworn in to testify about the Application. James Fuqua, Jr., Esquire, presented the case on behalf of the Applicants and submitted an exhibit booklet for the Board to review.
4. The Board found that Mr. Fuqua stated that the Applicants own a home in the Bethany Dunes subdivision. The Property borders the beach and fronts on Heather Lane.
5. The Board found that Mr. Fuqua stated that the variance will allow the Applicants to convert an existing dumbwaiter shaft into a handicap accessible elevator. The dumbwaiter was on the Property when the Applicants purchased the Property.
6. The Board found that Mr. Fuqua stated that the Applicants purchased the Property in 2006 and the dwelling was built in 1984.
7. The Board found that Mr. Fuqua stated that the ground floor is used for parking underneath the dwelling and the dwelling is elevated.
8. The Board found that Mr. Fuqua stated that the Applicants are in their seventies. The only access to the house is via stairs and the Applicants are finding it increasingly more difficult to access their home due to their age and mobility.
9. The Board found that Mr. Fuqua stated that the proposed elevator will provide the Applicants with access to the home and will be handicap accessible. The elevator will use the existing dumbwaiter shaft.
10. The Board found that Mr. Fuqua stated that the Bethany Dunes Architectural Review Committee has approved the proposed elevator and a variance from the community's restrictive covenants. The Applicants' neighbor opposed the variance request and the Applicants have tried to reach their neighbor to discuss her concerns.
11. The Board found that Mr. Fuqua stated that the Property is unique since all the living space is elevated and an elevator will allow the Applicants to access their home even after their mobility decreases.

12. The Board found that Mr. Fuqua stated that the existing shaft provides a unique opportunity to add the elevator and there are no other reasonable options to locate an elevator.
13. The Board found that Mr. Fuqua stated that the variance is necessary to enable reasonable use of the Property.
14. The Board found that Mr. Fuqua stated that the proposed elevator will open into common areas of the home. Other proposed locations of the elevator would disrupt the internal layout of the home or would be located in a bedroom.
15. The Board found that Mr. Fuqua stated that the difficulty is not being created by the Applicants.
16. The Board found that Mr. Fuqua stated that the variance will not alter the essential character of the neighborhood.
17. The Board found that Mr. Fuqua stated that the proposed elevator will not affect any views. There are trees on neighboring property which buffer the views of the proposed elevator.
18. The Board found that Mr. Fuqua stated that the proposed elevator will not project any farther into the setback than a chimney is permitted to encroach. A chimney can encroach two (2) feet into the side yard.
19. The Board found that Mr. Fuqua stated that the elevator will have the same appearance as a chimney from the exterior of the home.
20. The Board found that Mr. Fuqua stated that the variance requested is the minimum variance necessary to afford relief as it will allow for a handicap accessible elevator.
21. The Board found that Mr. Fuqua stated that the difficulty is not created by the Applicants since there is an inherent need and a pre-existing characteristic to the Property for an elevator.
22. The Board found that Mr. Aldock, under oath, affirmed the statements made by Mr. Fuqua.
23. The Board found that Mr. Aldock testified that the elevator cannot be built elsewhere due to the existing dwelling's location on the lot and the interior design of the dwelling.
24. The Board found that Mr. Aldock testified that the Applicants cannot build the elevator on the ocean side of the Property because of the location of an existing dune and the Applicants cannot build in the front of the dwelling because the elevator would block the front door and would be located in a bedroom. The bedrooms have built-in furniture.
25. The Board found that Mr. Aldock testified that the elevator cannot be located on other side of the house due to the location of bedrooms.
26. The Board found that Mr. Aldock testified that placement of the elevator in the center of the house would be a threat to the integrity of the roof.
27. The Board found that Mr. Aldock testified that he and his wife are in their seventies and, as they get older, they will have difficulty accessing their living space without an elevator.
28. The Board found that Mr. Aldock testified that most guests are also at an age that makes it difficult to access the guest rooms.
29. The Board found that Mr. Aldock testified that the proposed elevator will be compliant with the Americans with Disabilities Act and will allow the Applicants to stay in their home as they age.
30. The Board found that Mr. Aldock testified that the proposed elevator is the minimum sized needed for a handicap accessible elevator.
31. The Board found that Mr. Aldock testified that the elevator cannot be turned to fit within the setback area while still providing access to the home.
32. The Board found that Betty Cantera was sworn in to testify in opposition to the Application. Rob Gibbs, Esquire, was present on behalf of Ms. Cantera.

33. The Board found that Mr. Gibbs stated that Ms. Cantera owns the adjacent property on the side of the proposed elevator and she feels that the Homeowners Architect Review Committee overstepped their authority and cannot grant a variance.
34. The Board found that Mr. Gibbs stated that no provision of the restrictive covenants allows the committee to grant variances or change the recorded covenants.
35. The Board found that Mr. Gibbs stated that there are no unique circumstances to the Property and the dumbwaiter shaft is not a reason to allow for a variance.
36. The Board found that Mr. Gibbs stated that the Property can be otherwise developed and the Applicants can reasonably use the Property without a variance.
37. The Board found that Mr. Gibbs stated that the difficulty is being created by the Applicants.
38. The Board found that Mr. Gibbs stated that the Applicants do not want to be inconvenienced.
39. The Board found that Mr. Gibbs stated that the granting of the variance would set a negative precedent in the neighborhood.
40. The Board found that Ms. Cantera, under oath, affirmed the statements made by Mr. Gibbs.
41. The Board found that Ms. Cantera testified that she is 86 years old.
42. The Board found that Ms. Cantera testified that she believes the Applicants can turn to the elevator to bring it into compliance.
43. The Board found that Ms. Cantera testified that the shaft has to be modified to accommodate an elevator which changes the integrity of the existing shaft.
44. The Board found that Ms. Cantera testified that the elevator will be taller than the existing dumbwaiter.
45. The Board found that Ms. Cantera testified that the Applicants have not explored all options for the elevator.
46. The Board found that Mr. Fuqua stated that the proposed elevator will not extend any higher than the existing dumbwaiter shaft.
47. The Board found that Mr. Aldock testified that his architect has told him that the proposed location of the elevator is the only place the elevator can be placed.
48. The Board found that no parties appeared in support of the Application.
49. The Board found that one (1) party appeared in opposition to the Application.
50. The Board tabled its decision on this matter until November 21, 2016, at which time the Board discussed the Application. Board Member Norman Rickard advised the Board that he listened to the audio of the public hearing and reviewed the public record.
51. 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 as it is a lot located near that Atlantic Ocean. The Property includes dunes and other barriers to the rear yard which limit the development of the Property in the rear yard while also protecting the home from flooding. Notably, the Property is narrower than it is long and the lack of usable building space in the rear yard has created a small building envelope for a lot of this size. The Applicants, who are aging, seek to install an elevator in the location of an existing dumbwaiter so that they can have better access to the living quarters of the home. There is no living space on the ground floor and an elevator is necessary for wheelchair accessibility to the living areas. The situation is also unique because the home is already equipped with an existing dumbwaiter shaft. While the dumbwaiter is large enough to move suitcases, it is not handicap accessible and could not accommodate a wheelchair. As such, the elevator must be larger than the

dumbwaiter and will encroach into the side yard setback area. The unique physical conditions of the Property have created an unusual and limited building envelope for the Applicants and greatly limited the area where an elevator could be constructed.

- b. Due to the uniqueness of the Property, the Property cannot be developed in strict conformity with the Sussex County Zoning Code. The dwelling was constructed many years ago and the Applicants seek to make a reasonable addition to allow for the construction of a handicap accessible elevator but are unable to do so without violating the Sussex County Zoning Code. The Board is convinced that the variance is necessary to enable the reasonable use of the Property as the variance will allow a handicap accessible elevator to be constructed thereby affording handicap persons and those who have difficulty climbing stairs with reasonable access to the home. The Board is convinced that the size, shape, and location of this elevator shaft are reasonable, which is confirmed when reviewing the survey provided by the Applicant. The shaft encroaches into the side yard setback by only 2 feet and is actually only a few inches closer to the side yard property line than an existing spiral staircase. The Board has considered the arguments made by the opposition that the elevator is not necessary. The Applicants, however, have convinced the Board that the elevator is necessary for reasonable access to the home by persons with disabilities. Mr. Aldock is already experiencing joint problems which have necessitated injections and many of the Applicants' guests are suffering from similar, and even more advanced, problems. The inability to access the living quarters of the home would render the home unusable and, thus, the variances are necessary to enable reasonable use of the Property. The Board also notes that the Applicants are unable to build this elevator elsewhere on the Property due to the location of the dunes and existing construction of the dwelling. The Applicants' architect has even informed them that the proposed location of the elevator is the only place that it can be placed.
- c. The exceptional practical difficulty was not created by the Applicants. The Property has unique conditions as it is located near the Atlantic Ocean and has dunes and portions of the Property where an elevator cannot be placed. The Property is also narrow and the building envelope is small due to the narrowness of the lot and the unusable space on the Property due to the dunes. The Applicants seek to construct an elevator so that they can have safer and easier access to the living areas of the home (which are not at ground level). Importantly, the Applicants did not build the dwelling on the Property. Rather, the dwelling was constructed by a prior owner. The Board is convinced that the Applicants did not come to the Property with an unpermitted use in mind. Instead, the exceptional practical difficulty was created by the unique conditions of the Property which limit the area where a handicap accessible elevator could be placed. The opposition argues that the Applicants have failed to consider other alternatives but the Board is convinced that the Applicants have explored other possibilities for placement of the elevator. Notably, the Applicants presented unrebutted testimony that the existing flat roof of the dwelling presents certain structural and architectural challenges when constructing the elevator shaft.
- d. The variance 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 elevator will be located in the location of the existing dumbwaiter but will extend closer to the side property line. The views of the elevator will be screened by trees and the elevator will be no closer to the property line than a chimney. Under

the Sussex County Zoning Code, a chimney is allowed to encroach 2 feet into the side yard setback area and the proposed elevator will have an exterior appearance similar to that of a chimney would be if built in compliance with the Code. In this instance, it is difficult for the Board to see how the encroachment of two feet into the setback area will alter the essential character of the neighborhood or be detrimental to the public welfare and the Board was not persuaded by arguments by the Applicants' neighbor to the contrary. The opposition argued that the encroachment into the side yard setback area is a violation of the neighborhood's restrictive covenants yet the Board has no authority to enforce private restrictive covenants. Notwithstanding the lack of the Board's enforcement authority of private restrictions, the Applicants have presented a letter from the neighborhood architectural review committee approving of the proposed elevator which indicates that the elevator will not alter the essential character of the neighborhood.

- e. The variance sought is the minimum variance necessary to afford relief and the variance requested represents the least modification possible of the regulation at issue. The Applicants have demonstrated that the variance sought will allow the Applicants to construct a handicap accessible elevator on the Property that will provide safe access to the living space of the home. The Board is convinced that the Applicants explored other options, such as placement of the elevator outside of other portions of the home and underneath the home as well as the possibility of turning the elevator to fit within the building envelope – none of which worked. Given the unique characteristics of the Property and the construction of the home, both of which predated the Applicants' acquisition thereof, the Applicants are simply unable to construct this elevator elsewhere on the lot.

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. Jeff Hudson, and Mr. Norman Rickard. Mr. John Mills and Mr. Brent Workman 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 2/7/2017