

BEFORE THE BOARD OF ADJUSTMENT OF SUSSEX COUNTY

IN RE: JOSEPH F. DONOHOE & CYNTHIA C. DONOHOE

(Case No. 11894)

A hearing was held after due notice on December 19, 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 a variance from the front yard setback requirement.

Findings of Fact

The Board found that the Applicants are seeking a variance of two (2) feet from the thirty (30) feet front yard setback requirement on the west side and a variance of 1.6 feet from the thirty (30) feet front yard setback requirement on the north side for an existing second floor deck. This application pertains to certain real property located on the south side of Bayside Drive approximately 590 feet south of Oceanside Drive (911 Address: 36899 Bayside Drive, Fenwick Island); said property being identified as Sussex County Tax Map Parcel Number 1-34-22.00-50.00.

1. The Board was given copies of the Application, a survey of the Property dated November 2, 2016, photographs of the Property, a building permit application dated June 12, 2006, a building permit application dated February 16, 1983, a building permit application dated May 16, 1995, an aerial photograph of the Property, and a portion of the tax map.
2. The Board found that the Office of Planning & Zoning received one (1) letter of opposition to the Application from the Sea Towne Homeowners Association and no correspondence in support of the Application.
3. The Board found that Clay Jester was sworn in to testify about the Application. Kashif Chowdhry, Esquire, presented the case on behalf of the Applicants and submitted pictures for the Board to review. Mr. Jester submitted photographs of the Property for the Board to review.
4. The Board found that Mr. Chowdhry stated that the deck was rebuilt in 2006 and there were no changes to the foundation of the deck made at that time but the deck did expand to some extent.
5. The Board found that Mr. Chowdhry stated that Mr. Jester, who previously owned the Property, relied on his contractor and was unaware of the encroachment at that time.
6. The Board found that Mr. Chowdhry stated that Mr. Jester is unsure if the deck encroached prior to being rebuilt in 2006.
7. The Board found that Mr. Chowdhry stated that a survey completed for settlement related to the recent sale of the Property showed the encroachments.
8. The Board found that Mr. Chowdhry stated that the Property is unique in shape as the Property is irregularly shaped and is bordered by a cul-de-sac and a side road.
9. The Board found that Mr. Chowdhry stated that the Property is the only lot in the community which has this unique shape and road frontage. The Property has two (2) front yard setback requirements.
10. The Board found that Mr. Chowdhry stated that only the corners of the existing second floor deck encroach into the setback areas.
11. The Board found that Mr. Chowdhry stated that other portions of the deck can be expanded without encroaching into the setback areas.
12. The Board found that Mr. Chowdhry stated that the Property cannot otherwise be developed in strict conformity with the Sussex County Zoning Code.

13. The Board found that Mr. Chowdhry stated that the encroachments have gone unnoticed until recently and the deck has a similar appearance from other decks in the neighborhood.
14. The Board found that Mr. Chowdhry stated that the unique curvature of the lot has created the difficulty.
15. The Board found that Mr. Chowdhry stated that the deck faces the bay and does not affect any views of the bay.
16. The Board found that Mr. Chowdhry stated that the deck has no adverse effect on neighboring properties and the variances will not alter the essential character of the neighborhood.
17. The Board found that Mr. Chowdhry stated that there have been no previous complaints from the neighbors or Seatowne Homeowners Association.
18. The Board found that Mr. Chowdhry stated that the variances are the minimum variances necessary to afford relief.
19. The Board found that Mr. Jester, under oath, affirmed the statements made by Mr. Chowdhry.
20. The Board found that Mr. Jester testified that he was one of the owners of the Property until it was recently sold to the Applicants. He and his family were unaware of the encroachments until the day before settlement.
21. The Board found that Mr. Jester testified that his father previously owned the Property and purchased the Property in 1984.
22. The Board found that Mr. Jester testified that the Property is located in the Seatowne development and is located along a cul-de-sac near the Little Assawoman Bay.
23. The Board found that Mr. Jester testified that the deck was made of salt-treated lumber and needed to be replaced.
24. The Board found that Mr. Jester testified that the decks were also not properly fastened to the dwelling so the deck was in need of a major overhaul. The railings were made safer and the decks and joists were replaced.
25. The Board found that Mr. Jester testified that there was no intent to increase the size of the decks.
26. The Board found that Mr. Jester testified that the Seatowne Homeowners Association was notified of the deck improvements in 2006.
27. The Board found that Mr. Jester testified that the encroachments have gone unnoticed and were only discovered by a recent survey of the Property.
28. The Board found that Mr. Jester testified that the deck does not adversely affect other properties in the development.
29. The Board found that Mr. Jester testified that his contractor obtained the building permits for the deck.
30. The Board found that Mr. Jester testified that the Property was surveyed in the 1980s and was not surveyed again until recently.
31. The Board found that Mr. Jester testified that there is approximately 14 feet from the edge of paving to the front property line and the difference between the edge of paving and the property line gives the impression that the Property is larger than it actually is.
32. The Board found that Fred Wetzelberger was sworn in and testified in opposition to the Application.
33. The Board found that Mr. Wetzelberger testified that he is on the Board of Directors for the Seatowne Homeowners Association.
34. The Board found that Mr. Wetzelberger testified that the community has 42 homes and has its own building requirements and the community is concerned about the bad precedent of exceeding the property lines.

35. The Board found that Mr. Wetzelberger testified that the Association's architectural review board approved the plan in 2006 provided that the deck was built in compliance with the Sussex County Zoning Code.
36. The Board found that Mr. Wetzelberger testified that Seatowne has been involved in previous litigation when the setback requirements have not been met.
37. The Board found that Mr. Wetzelberger testified that it is unfortunate the deck was not built into compliance but approval of a variance in the development could set a precedent.
38. The Board found that Mr. Wetzelberger testified that there is room on the Property where the deck can be built and the deck can be built in compliance with the Code.
39. The Board found that Mr. Wetzelberger testified that it is easier to square off a deck and this deck appears to have been squared off.
40. The Board found that Mr. Wetzelberger testified that the contractor did not comply with the setback requirements.
41. The Board found that Mr. Wetzelberger testified that the contractor works for the property owner and the property owner and builder should have made sure the setback requirements were met.
42. The Board found that Mr. Wetzelberger testified that the Association wants the deck brought into compliance with the Code.
43. The Board found that Mr. Wetzelberger testified that the Property is not unique for the development.
44. The Board found that two (2) parties appeared in support of the Application.
45. The Board found that one (1) party appeared in opposition to the Application.
46. The Board tabled the Application until February 6, 2017, at which time the Board discussed and voted on the Application.
47. 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 a unique lot as it is oddly shaped and abuts two roads. As a result of these conditions, the Property has a very unique building envelope. Notably, the Property is different in size and shape from other lots in the neighborhood. While there appears to be no standard sized lot in the community, most of the lots only have road frontage along one road and those which do have road frontage along multiple roads are not shaped in this manner. It appears from the tax map as though, perhaps, only one other lot in this entire community has a similar curvature and dual road frontage. The Property is also unique because the adjacent Bayside Drive is not entirely paved. Rather, there is a gap of approximately 14 feet between the edge of paving and the front property line of the Property. This gap gives the false impression that the Property is larger than it actually is and that the decks would not encroach into the setback areas. Ultimately, the Board finds that the unique physical conditions of the Property have created an exceptional practical difficulty for the Applicants who simply seek to retain the decks on the Property in their current location.
 - b. Due to the uniqueness of the Property, the Property cannot be developed in strict conformity with the Sussex County Zoning Code. The decks were constructed many years ago and were replaced in 2006. When replaced, the decks were improved by the installation of new joists and safety railings which may have slightly increased the size of the decks. The previous owner obtained the necessary permits and relied on his contractor to comply with the Code requirements. Based on the pictures and the survey, the decks appear to be reasonable in size. The Applicants seek to retain the existing decks on the same footprint but are unable to do so without

violating the Sussex County Zoning Code. Due to the odd shape of the Property and the slight encroachment of only corners of the decks (where support posts appear to be located), the deck cannot be moved into compliance. The Board is convinced that the variances are necessary to enable the reasonable use of the Property as the variances will allow the decks to remain on the Property. The Board is also convinced that the size, shape, and location of these decks are reasonable, which is confirmed when reviewing the survey provided by the Applicants.

- c. The exceptional practical difficulty was not created by the Applicants. The Applicants only recently acquired the Property and did not place the decks on the Property. Rather, the decks were placed on the Property by a prior owner who relied on his contractor to build the deck in compliance with the Sussex County Zoning Code only to later learn of the encroachments. The Board notes that the Property's unique shape and dual road frontage have also posed a particular challenge for the Applicants as the building envelope has an unusual shape and is smaller than similarly sized lots which only have frontage along one road. The Applicants did not create the size or shape of the lot nor did the Applicants place the decks on the Property. The Board also notes that the encroachments were only recently discovered even though the decks have been on the Property for at least 10 years in this location. The Board finds that the unique situation and physical conditions of the Property have created the exceptional practical difficulty for the Applicants.
- 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 decks have been on the Property for many years without recorded complaints and no additions to the deck are being proposed. The only complaint in the record is from the homeowners association yet the association did not even appear to be aware of the encroachment prior to the filing of this application. The association has concerns about setting a precedent in the neighborhood as the community has its own set of restrictive covenants and standards. While the Board appreciates that the association has its own standards, the Board has no jurisdiction to enforce those standards. The Board finds that the concerns raised by the association about the effect of the variances on the character of the neighborhood have no merit. The decks have been on the Property for many years and the association only realized the encroachment when it was brought to its attention as part of this application process. If the decks had some effect on the character of the neighborhood, the Board would have expected this issue to have been raised sooner or, more importantly, for the opposition to present some evidence or data that the slight encroachment of a portion of these decks into the setback areas would somehow alter the essential character of the neighborhood or be detrimental to the public welfare. As previously discussed, the encroachment is likely unnoticeable due to the discrepancy of the front property line and the edge of paving of the adjacent road which thereby makes the Property appear larger. Pictures of the decks and testimony presented by the Applicants also demonstrate that the decks are similar to others in the community. The Board also notes that the Property, by its own shape and size, differs from other lots so it is difficult to see how these slight encroachments on a property that is materially different than others in the neighborhood would alter the essential character of the neighborhood.
- 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 Applicants have demonstrated that the variances sought will allow the Applicants to retain the decks on the Property in their present location. No modification or addition to the decks is being proposed.

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. Jeff Hudson, Mr. John Mills, and Mr. Brent Workman. No Board Member voted against the Motion to approve the variance application. Mr. Dale Callaway and Mr. Norman Rickard did not participate in the vote on 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 3/8/2017