

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

**IN RE: MICHAEL JAHNIGEN**

**(Case No. 11898)**

A hearing was held after due notice on January 9, 2017. 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 minimum lot width requirement for a parcel.

Findings of Fact

The Board found that the Applicant was seeking a variance of 24.49 feet from the 150 feet lot-width requirement for a parcel. This application pertains to certain real property located on the northeast side of Pepper Creek Road and north of Dogwood Drive (911 Address: 30909 Pepper Creek Road, Dagsboro); said property being identified as Sussex County Tax Map Parcel Number 1-34-6.00-12.00.

1. The Board was given copies of the Application; a portion of the tax map of the area, an aerial photograph of the Property, proposed findings of fact, and a survey of the Property dated October 28, 2016. A copy of the Application was forwarded to the Sussex County Administrator as well.
2. The Board found that the Office of Planning & Zoning received no correspondence in support of or in opposition to the Application.
3. The Board found that Michael Jahnigen and Tom Ford were sworn in to testify about the Application. Robert Witsil, Esquire, presented the case on behalf of the Applicant and submitted exhibits for the Board to review.
4. The Board found that Mr. Witsil stated that the parcel is within Conservation District and is subject to the Conservation District regulations.
5. The Board found that Mr. Witsil stated that the Property is located along Pepper Creek and Dogwood Acres is located nearby.
6. The Board found that Mr. Witsil stated that many neighboring lots are also within the Conservation District but are not 150 feet wide.
7. The Board found that Mr. Witsil stated that the Property is larger than neighboring lots.
8. The Board found that Mr. Witsil stated that the proposed subdivision meets all the Conservation District regulations except for the 150 feet lot-width regulation. Lots within the Conservation District are required to be 150 feet wide and lot width is to be measured at the building restriction line pursuant to §115-4 of the Sussex County Code.
9. The Board found that Mr. Witsil stated that the front portion of the lot was designed to be perpendicular.
10. The Board found that Mr. Witsil stated that Parcel #1 will be 150 feet wide at the building restriction line and no variance will be needed for that parcel. Parcel #2 will be 125.51 feet wide at the building restriction line and a variance is needed for that parcel.
11. The Board found that Mr. Ford testified that, except for the lot width requirement for Parcel #2, the proposed subdivision meets all of the conservation and subdivision requirements including the acreage requirement and the lot width requirement for the rear of the lots.

12. The Board found that Mr. Ford testified that a soil analysis was performed and the analysis concluded that the soils could support septic systems for the proposed lots.
13. The Board found that Mr. Ford testified that the Applicant will meet the fifty (50) feet setback from tidal waters requirement.
14. The Board found that Mr. Ford testified that other lots in the neighborhood do not meet the 150 feet lot width requirement and the proposed subdivision will conform with the neighboring properties. The lots will even be larger than some of those lots.
15. The Board found that Mr. Ford testified that the existing dwelling on the Property will be removed but the existing dock and bulkhead will remain.
16. The Board found that Mr. Ford testified that he does not foresee difficulty designing buildable areas on the two lots.
17. The Board found that Mr. Ford testified that a literal enforcement of the lot width requirement would result in an unwarranted hardship to the Applicant.
18. The Board found that Mr. Ford testified that there is no other configuration to subdivide the parcel which would meet the lot width requirements. He tried to subdivide the Property in different ways but was still unable to meet the lot width requirement.
19. The Board found that Mr. Ford testified that the proposed subdivision will not have an adverse effect to the adjacent tributary.
20. The Board found that Mr. Ford testified that the current lot size of the Property is unique to the area and the proposed lots will be more in character with the neighborhood.
21. The Board found that Mr. Ford testified that the lots have been seeded.
22. The Board found that Mr. Ford testified that the Conservation District became effective in 1989 and that the existing lots in the neighborhood pre-exist the Conservation District regulations.
23. The Board found that Mr. Jahnigen testified that he is the owner of the Property.
24. The Board found that Mr. Jahnigen testified that he has spoken with some of the neighbors and they have no objection to the Application.
25. The Board found that Mr. Jahnigen testified that the existing dwelling will be removed.
26. The Board found that Mr. Jahnigen testified that the variance will bring the Property more into conformity with the neighborhood.
27. The Board found that Mr. Jahnigen testified that he affirms the statements made by Mr. Ford and Mr. Witsil as true and correct.
28. The Board found that John Covelli, Harry Backus, Robert Rankin, Karen Merritt, and Teresa Maney were sworn in and testified in opposition to the Application.
29. The Board found that Mr. Covelli testified that the lot adjacent to the Property is a federally protected lot and he is concerned about the fifty (50) feet access easement shown on Parcel #1 because the proposed access easement appears to have access to the neighboring gravel drive.
30. The Board found that Mr. Ford testified that the proposed access easement shown on the survey is to allow access to Parcel #2 from the existing driveway on Parcel #1. Parcel #1 and Parcel #2 will share a driveway. There will not be access to the neighboring property to the west.
31. The Board found that Mr. Rankin testified that the gravel drive is used to gain access to the waterway. He also expressed a concern about whether the Property would be used for single-family dwellings or condominiums.
32. The Board found that Mr. Jahnigen testified that the proposed dwellings for the lots will be single-family homes.
33. The Board found that no parties appeared in support of the Application.
34. The Board found that five (5) parties appeared in opposition to the Application.

35. Based on the findings above and the testimony and evidence presented at the public hearing and the public record, 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, which consists of 2.12 acres as shown on the survey, is unique as it a large lot in the conservation zone located along Pepper Creek. Even though the Property is large enough to meet all of the other regulations of the conservation zone district – including the lot size requirement, the Property is not wide enough in the front yard to accommodate the minimum 300 feet needed to subdivide the lot into two parcels. These unique characteristics of the Property have created an exceptional practical difficulty for the Applicant who seeks to subdivide the lot.
  - b. Due to the Property's unique conditions, the Property cannot be subdivided in strict conformity with the Sussex County Zoning Code. The Applicant seeks to subdivide the Property into two lots but is unable to do so without violating the Sussex County Zoning Code due to the unique conditions of the lot. The Board is convinced that the proposed subdivision of the Property is reasonable and that the variance requested is necessary to enable the reasonable use of the Property as the variance will allow the Applicant to reasonably subdivide the Property. The survey attached to the Application confirms that the subdivision is reasonable.
  - c. The exceptional practical difficulty was not created by the Applicant. The Applicant did not create the unique size and shape of the Property. No evidence was presented that the lot's size and shape has changed since the implementation of the lot width requirement in the Sussex County Zoning Code for conservation zone district properties. Notably, the Property is quite large and could easily service two dwellings on separate lots but the Property is too narrow to meet the lot width requirement. The unique characteristics of the Property are clear when reviewing the survey. The Board is convinced that these unique conditions have created an exceptional practical difficulty for the Applicant.
  - 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 Property will be subdivided into two lots – one of which will meet the necessary lot width requirement and one of which will be slightly smaller than the lot width requirement. The unrebutted evidence confirms that there are other lots in the neighborhood which are less than 150 feet wide and no evidence was presented that the proposed subdivision of the Property would somehow alter the essential character of the neighborhood or be detrimental to the public welfare. Neighbors who appeared in opposition had concerns about the easement and use of nearby federal lands but the easement presented by the Applicant demonstrates that the two parcels will share an existing driveway and the easement was for that purpose and not for access to the neighboring federal lands. Neighbors also expressed concern about the type of homes being placed on the lots but, as testified by the Applicant, the homes will be single family homes which are similar to others in 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 Applicant has demonstrated the variance will allow the Property to be subdivided into two lots. The proposed subdivision will include one lot which will meet the lot width requirement but not be wider than the minimum requirement. By limiting the size of the lot which will

comply with the lot width requirement, the Applicant is minimizing the need for the variance for the other, narrower lot (Parcel #2 as shown on the survey). The Board also notes that the Applicant's engineer testified that he tried to find other ways to subdivide the Property without a variance but could not do so.

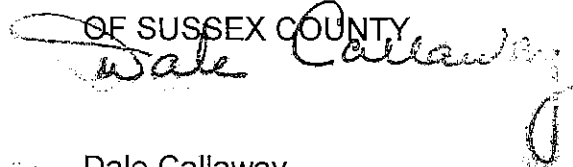
- f. The Applicant has demonstrated that special conditions or circumstances exist in that the proposed two lot subdivision has considerable frontage on a tributary to the Indian River Bay and that the nature of the divided lots is similar to the size and characteristics of neighboring properties. These conditions are peculiar to the land within the County and a literal enforcement of provisions within the conservation zone, as designated by this section would result in unwarranted hardship.
- g. The variance request is not based upon conditions or circumstances which are a result of actions by the applicant, other than the filing of the referenced minor subdivision application. The 2.12 acre parcel is otherwise appropriate for subdivision and the resulting lots shall be similar in conformation to, and larger in size to the surrounding community of subdivided lots, several of which are non-conforming to the requirements of the Conservation Zone. The variance request does not arise from any condition relating to the land use, either permitted or nonconforming, on any neighboring property.
- h. The granting of a variance will not adversely affect water quality or adversely impact the tidal water bodies adjacent to the Conservation Zone. The proposed lot that is the subject of the variance otherwise meets the Tidal Waters protective setback of 50 feet and all other setback and area requirements but for the 150 feet lot width requirement for Parcel #2. The existing dock will be shared by the owners of Parcels #1 and #2 and there will be no disturbance within the tidal setback areas. Variances will be in harmony with the general spirit and intent of the section and any subsequent regulations. Necessary septic system permits will be acquired.
- i. The application for a variance has, in fact, been made, in writing to, the Board of Adjustment on forms provided by the County, with a copy to the County Administrator.

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, Mr. John Mills, and Mr. Brent Workman. No Board Members voted against the Motion to approve the variance application. Mr. Norman Rickard did not participate in the discussion or 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 February 21, 2017.