

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

**IN RE: KLEM, LLC**

**(Case No. 11995)**

A hearing was held after due notice on July 24, 2017. The Board members present were: Mr. Dale Callaway, Ms. Ellen Magee, Mr. John Mills, Mr. Norman Rickard, and Mr. Brent Workman.

Nature of the Proceedings

This is an application for a variance from the height requirement.

Findings of Fact

The Board found that the Applicant is seeking a variance between 2.49 feet and 8.49 feet from the forty-two (42) feet height requirement for a proposed building and a variance of 13.74 feet from the forty-two (42) feet height requirement for a proposed rooftop HVAC unit. This application pertains to certain real property located at the southwest corner of Coastal Highway (Route 1) at the intersection with South Street (911 Address: 19178 Coastal Highway, Rehoboth Beach) said property being identified as Sussex County Tax Map Parcel Number 3-34-13.00-157.00 & 158.00.

1. The Board was given copies of the Application, aerial photographs of the Property, a portion of the tax map of the area, elevation drawings, a preliminary site plan of the Property, newspaper articles, and pictures.
2. The Board found that the Office of Planning & Zoning received no correspondence in support of the Application and one (1) letter in opposition to the Application.
3. The Board found that William Klemkowski, Michael Meoli, and Matt Runyon were sworn in to testify about the Application. James Fuqua, Esquire, presented the case on behalf of the Applicants and submitted exhibits for the Board to review.
4. The Board found that Mr. Fuqua stated that Mr. Klemkowski and Mr. Meoli are members of the Applicant. Mr. Meoli previously operated the Hampton Inn on Route 1 for 13 years.
5. The Board found that Mr. Fuqua stated that the variances are for a proposed hotel to be located on the Property. The Property is currently used by Jake's Seafood restaurant.
6. The Board found that Mr. Fuqua stated that the Property is rectangular shaped with a panhandle. The Property contains 2.15 acres. The Property and other nearby properties are zoned C-1 commercial. Hotels are permitted in this zoning district.
7. The Board found that Mr. Fuqua stated that the Applicant intends to construct a Hilton hotel under the Tru by Hilton brand and that the design of the hotel is a major part of the Tru by Hilton brand. The design contains distinct architectural features.
8. The Board found that Mr. Fuqua stated that the prototype of the hotel will exceed the Sussex County height restriction. The deck of the roof is 44.49 feet tall and the hotel has other height elevations as well which are related to the hotel's architectural design and do not include habitable space.
9. The Board found that Mr. Fuqua stated that the hotel's HVAC equipment will be housed on the roof as well and the Applicant seeks a variance for the HVAC system but "cooling towers" are considered authorized exceptions to the height ordinance.
10. The Board found that Mr. Fuqua stated that HVAC equipment is similar to a "cooling tower" and is arguably exempt from the height requirements but the Applicant seeks the variance for the HVAC system to be safe either way.

11. The Board found that Mr. Fuqua stated that the proposed hotel will not alter the essential character of the neighborhood and the increased height will have no negative impact on neighboring properties and will likely be imperceptible. A Comfort Inn is located on an adjacent parcel and there are other hotels located nearby.
12. The Board found that Mr. Fuqua stated that the hotel will improve the storm water management of the Property to allow for improved groundwater recharge.
13. The Board found that Mr. Fuqua stated that the Planning & Zoning Commission has approved the preliminary site plan for the hotel.
14. The Board found that Mr. Fuqua stated that the exceptional practical difficulty results from the design requirements of the Tru by Hilton brand.
15. The Board found that Mr. Fuqua stated that standard brand hotels have standard heights beyond the Sussex County height requirements and a typical 98 room hotel cannot fit within the 42 feet height limit. A floor could be removed from the hotel but the hotel would not be economically viable.
16. The Board found that Mr. Fuqua stated that the Holiday Inn on Route 1 is approximately 46 feet tall, the Hampton Inn on Route 1 is approximately 48 feet tall, the Heritage Inn on Route 1 is approximately 45 feet tall and the Fairfield Inn on Route 1 is 52 feet tall. The Board approved a variance in May 2017 for a Days Inn to be 47 feet tall (Case No. 11994 – Destiny, LLC).
17. The Board found that Mr. Fuqua stated that the Sussex County Zoning Code previously allowed for public and semi-public buildings to be 60 feet tall but the Code has since been amended.
18. The Board found that Mr. Fuqua stated that the circumstances were not created by the Applicant.
19. The Board found that Mr. Fuqua stated that the variances requested are the minimum variances necessary to afford relief.
20. The Board found that Mr. Fuqua stated that the Delaware Supreme Court in Kwik-Check Realty held that the inability to improve one's business or to stay competitive as a result of area limitations may be a legitimate exceptional practical difficulty that may justify a variance.
21. The Board found that Mr. Meoli and Mr. Klemkowski, under oath, affirmed the statements made by Mr. Fuqua.
22. The Board found that Mr. Meoli testified that the hotel chains have been stringent on the number of rooms that will be permitted and Hilton will not approve a hotel of fewer than 90 rooms.
23. The Board found that Mr. Meoli testified that the economics of the hotel will not work if the hotel was only 3 stories tall.
24. The Board found that Mr. Meoli testified that the Comfort Inn is the last hotel built in Sussex County that has fewer than 4 stories.
25. The Board found that Mr. Meoli testified that mechanical designs have changed over the years to allow for ductwork improvements and hotels had mold problems because of the design of previous HVAC systems. The roof-top HVAC systems have been designed to alleviate these problems but the ductwork has grown to accommodate these systems.
26. The Board found that Mr. Klemkowski testified that he purchased the Property in 2002 and opened Jake's Seafood in 2003.
27. The Board found that Mr. Fuqua stated that there is no extremely unique physical feature of the site but the panhandle portion of the Property is useful only as parking.
28. The Board found that Mr. Fuqua stated that the economic reality of the use and the industry standards do not conform with the Sussex County height limitation.
29. The Board found that Shawn Tucker, Esquire, appeared in opposition to the Application and submitted exhibits to the Board to review.

30. The Board found that Mr. Tucker stated that he represents Resort Hotel, LLC, which owns the Comfort Inn located adjacent to the Property. The Comfort Inn is a 3 story hotel with 96 rooms and complies with the Sussex County height requirement. The Comfort Inn parcel consists of approximately 3 acres.
31. The Board found that Mr. Tucker stated that other hotels exceed the height limitation but those hotels utilized an exception in the Code and those hotels did not need a height variance.
32. The Board found that Mr. Tucker stated that the Applicant must demonstrate that there is some unique physical condition with the Property.
33. The Board found that Mr. Tucker stated that the "panhandle" portion of the Property cited by Mr. Fuqua was obtained by the Applicant after acquiring the main portion of the lot.
34. The Board found that Mr. Tucker stated that site design costs cited by the Applicant do not rise to the level of unique physical conditions and that there is no substantial evidence in the record that a unique physical condition exists which creates a hardship.
35. The Board found that Mr. Tucker stated that the Property is already developed by a restaurant and there is no evidence that a restaurant could not succeed on the Property.
36. The Board found that Mr. Tucker stated that the Applicant could build a hotel within the 42 feet height limitation and that the exceptional practical difficulty is self-created.
37. The Board found that Mr. Tucker stated that there is no evidence in the record that a hotel could not succeed on the site while still complying with the height requirements and approval of the variance creates an unfair advantage for the Applicant.
38. The Board found that Mr. Tucker stated that the Applicant's partnership with a hotel chain that has certain design requirements does not satisfy the legal requirements for the granting of a variance.
39. The Board found that Mr. Tucker stated that the character of the immediate area is that buildings do not exceed 42 feet tall.
40. The Board found that Mr. Tucker stated that his client's hotel provides for approximately 33 rooms per acre and that the Applicant's hotel provides for an increase in density over the Comfort Inn. The increase in density is approximately 47% and provides a competitive business advantage.
41. The Board found that Mr. Tucker stated that the Comfort Inn parcel and the Property share an access to Route 1.
42. The Board found that Mr. Tucker stated that the Applicant received a parking waiver from the Planning & Zoning Commission whereby the number of parking spaces required for the site were reduced and his client has concerns about the Applicant's patrons parking on his client's property.
43. The Board found that Mr. Tucker stated that parking overflow from the Applicant's hotel will most likely go to the Comfort Inn parcel and the greater height of the hotel leads to more rooms on the site and a greater need for parking.
44. The Board found that Mr. Fuqua stated that he was involved in the Vineyards at Nassau and the issue at that time was a clause in the Code which allowed for public or semi-public buildings to be constructed up to 60 feet tall if they increased their yard setbacks. The Vineyards was planned to be public on the first floor and residential on the upper floors and he argued that the building fit within the definition of a public or semi-public structure and should be allowed to be constructed up to 60 feet tall and the County agreed with that position – which was the first time that specific interpretation was given. Another hotel also used that same interpretation as well. Thereafter, Sussex County Council amended the

Code to limit buildings which can exceed 42 feet tall to governmental buildings and other similar public uses.

45. The Board found that Mr. Fuqua stated that the industry standard for parking for a hotel is 1.5 spaces per room plus spaces for employees.
46. The Board found that Mr. Tucker stated that the case law is clear and, if a property is being reasonably utilized or can be reasonably utilized without exceeding the height limitation, the property can be developed without a variance and that reasonable use can exist even if it is not the applicant's preferred use.
47. The Board found that Mr. Stephen Silver was sworn in to testify in opposition to the Application.
48. The Board found that Mr. Silver testified that his hotel has a large breakfast room that also serves as a conference room after breakfast hours. The conference room is sometimes used by local groups for meetings and trainings.
49. The Board found that Mr. Silver testified that the statements made by Mr. Tucker are true and correct.
50. The Board found that Mr. Tucker stated that there is a risk of overflow parking onto his client's parcel due to the shift from the use of the Property as a restaurant to a hotel.
51. The Board found that Mr. Meoli testified that the Applicant regularly allows employees of the Comfort Inn to park on the Property and the Comfort Inn has a much larger parking waiver than is being provided to the Applicant. He testified that hotels and restaurants typically have different traffic flows.
52. The Board found that Mr. Silver testified that the restaurant is a compatible business with his hotel and his patrons often go to the Jake's Seafood restaurant currently on the Property but he is concerned about the parking for the proposed hotel. Mr. Silver testified that his property has significant parking for his patrons.
53. The Board found that no parties appeared in support of the Application.
54. The Board found that one (1) party appeared in opposition to the Application.
55. The Board tabled the Application until August 7, 2017, at which time the Board discussed and voted on the Application.
56. 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 failed to meet the standards for granting a variance. The findings below further support the Board's decision to deny the Application.
  - a. The Applicant failed to demonstrate that there are unique physical circumstances or conditions, or exceptional topographical or other physical conditions peculiar to the Property, and that an exceptional practical difficulty is due to such conditions, and not to circumstances or conditions generally created by the Zoning Code. The Property is a parcel consisting of approximately 2.185 acres. The Property has significant road frontage and does not appear to have a shape which would not otherwise be conducive to a hotel. The Board was not convinced that there were any topographical or other physical conditions which would limit the development of the Property in such a way as to create an exceptional practical difficulty for the Applicant. Rather, the difficulty appears to be related to the Applicant's preferred design of the proposed hotel.
  - b. The Applicant failed to demonstrate that there is no possibility that the Property can be developed in strict conformity with the provisions of the Zoning Code and that the authorization of a variance is therefore necessary to enable the reasonable use of the Property. The Property is already being reasonably used as a restaurant and, thus, can be reasonably used without a variance. To the extent the Property is proposed to be used as a hotel, the Board also finds that the Property could be reasonably used as a hotel within the confines of the height restrictions found in the Sussex County

Zoning Code. Notably, a hotel on an adjacent property complies with the 42 feet height requirement. The Applicant has cited that the design features of this particular hotel chain necessitate that the hotel be taller than 42 feet but the Board was not convinced that a hotel could not be constructed in compliance with the Code.

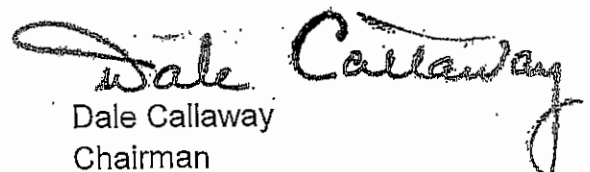
- c. The Applicant failed to demonstrate that an exceptional practical difficulty has not been self-created. When the difficulty results from the applicant's preferred use of the land and not the particular features of the Property, the difficulty the applicant suffers is self-created. In this case, there are no particular features of the Property which have created the difficulty. The Board was not convinced that the variance request was the product of a *need*. Instead, the variance request appears to be the product of a *want* as the owner seeks to place the hotel as proposed for purposes of convenience and profit, and / or caprice.
- d. The variances will alter the essential character of the neighborhood or substantially or permanently impair the appropriate use or development of adjacent property, or be detrimental to the public welfare. The Board is convinced that the additional height of the proposed hotel beyond the height limitation will enable the Applicant to place more rooms on the Property than it would otherwise be able to do if the hotel met the height requirement. The Board heard concerns of a neighboring hotel regarding overflow parking and the Board shares those concerns. The overflow parking onto the neighboring hotel would lessen the neighbor's ability to use its own parking area. The height variance also puts the neighboring hotel, which designed its hotel to comply with the height requirement, at a competitive disadvantage and thereby threatens to impair the appropriate use of that hotel. Furthermore, the character of the immediate neighborhood is for buildings which do not exceed 42 feet tall. The proposed hotel will exceed that reasonable height limitation and will alter the character of the neighborhood which consists of buildings which comply with the height requirement.
- e. Since the variances are not necessary to enable reasonable use of the Property, the variances requested are not the minimum variances necessary to afford relief. Rather, no variances are needed because the Property can be developed in compliance with the Code.

The Board denied the variance application finding that it failed to meet the standards for granting a variance.

Decision of the Board

Upon motion duly made and seconded, the variance application was denied. The Board Members in favor of the motion to deny were Mr. Dale Callaway, Ms. Ellen Magee, Mr. John Mills, Mr. Norman Rickard, and Mr. Brent Workman. No Board Member voted against the Motion to deny the variance application.

BOARD OF ADJUSTMENT  
OF SUSSEX COUNTY

  
Dale Callaway  
Chairman

Date September 19, 2019