

BEFORE THE BOARD OF ADJUSTMENT OF SUSSEX COUNTY

IN RE: JOHN FLOYD LINGO, III

(Case No. 12001)

A hearing was held after due notice on August 7, 2017, and then tabled until August 21, 2017. The Board members present on August 21, 2017 were: Mr. Dale Callaway, Mr. Jeff Hudson, Mr. Norman Rickard, Mr. Brent Workman, and Ms. Ellen Magee.

Nature of the Proceedings

This is an application for a variance from the front yard setback requirement for a fuel tank canopy (Sections 115-82, 115-83.8 and 115-185 of the Sussex County Zoning Code).

Finding of Fact

The Board found that the Applicant is seeking a variance from the front yard setback requirement for a fuel tank canopy on a parcel of land zoned CR-1. The property is identified as Sussex County Tax Map and Parcel Number 2-35-30.00-68.00 and 69.00, with a 911 address of 26452, 26454, 26462, 26466 and 26474 Lewes-Georgetown Highway, Harbeson, Delaware.

After the hearing, the Board made the following finding of fact:

1. The Board was given copies of the Application and a portion of the tax map of the area.
2. Janelle Cornwell, of Sussex County, described the case and stated that the Office of Planning and Zoning has no letters concerning the Application.
3. Mike Riemann, John Lingo and Harry Bowen were sworn in and testified about the request for a variance of 43.9 feet from the 60 foot front yard setback along Route 9.
4. The Board found that Mike Riemann testified that the applicant is seeking to construct a Royal Farms convenience store with gas pumps at the property, which is located at the intersection of Routes 5 and 9 in Harbeson, Delaware.
5. The Board found that Mike Riemann testified that the property has been used for the purpose of a convenience store with deli and gas pumps for many years.
6. The Board found that Mike Riemann testified that while used as a convenience store with gas pumps, the property had a completely open road frontage along Routes 5 and 9.
7. The Board found that Mike Riemann testified that the Delaware Department of Transportation ("DelDot") is constructing significant roadway improvements at the Routes 5 and 9 intersection, and that these improvements have resulted in DelDot acquiring some of the adjacent property where the applicant's business will be located.
8. The Board found that Mike Riemann testified that the applicant's property is more impacted by the DelDot work than some of the others at the intersection because one of the other properties has extensive wetlands on it and the other is a cemetery with boundaries right up to the current DelDot right of way.
9. The Board found that Mike Riemann testified that as part of both the DelDot work and the redevelopment of the property, DelDot is discontinuing the completely open-accessed frontage to the property that currently exists and is requiring limited right-in/right-out access at Route 9 and the remainder of the access via a side entrance on Route 5.
10. The Board found that Mike Riemann testified that as a result of the DelDot work, the entrance improvements mandated by DelDot, stormwater management requirements, safe movement of vehicles and trucks within the site, other building separations and setback requirements and other factors, the variance is necessary for the location of the gas pumps and canopy.
11. The Board found that Mike Riemann testified that in addition to other factors, the gas pump location is closer to the property line as a result of the DelDot acquisition from the intersection improvements than it would have been prior to the DelDot acquisitions.

12. The Board found that Mike Riemann testified that the canopy over the gas pump created the need for the front yard variance, as the canopy is a necessary part of the gas pump structure for safety and weather protection; and that a canopy previously erected on the site was just 6.9 feet from the existing right of way.
13. The Board found that Mike Riemann testified that it is the canopy itself that overhangs the setback and that there is light and air space beneath the canopy that mitigates the effect of the encroachment, unlike a typical encroachment that involves a solid structure.
14. The Board found that Mike Riemann testified that the need for a variance was not caused by the applicant, but instead was caused by factors outside of the applicant's control, primarily the intersection improvements undertaken by DelDot.
15. The Board found that Mike Riemann testified that the need for the variance is due to the unique size, shape and location of the property, particularly after the DelDot intersection work.
16. The Board found that Mike Riemann testified that the variance will not alter the essential character of the property, since it has historically been used as a gas station and that the redevelopment with limited entrances will actually be an improvement both visually and for safety reasons. Also, this new canopy merely replaces an existing one, but with less of an encroachment.
17. The Board found that Mike Riemann testified that the variance is the minimum necessary to effect relief.
18. The Board found that no parties appeared in opposition to the application.
19. Based on the findings above and the testimony and evidence presented during the public hearing and contained in the Public Record, the Board determined that the front yard variance application should be approved. The findings below further support the Board's decision to grant the variance.
 - a. The need for the front yard variance for the Route 9 side of the property was not created by the Applicant, but instead was created by outside factors, including the DelDot intersection improvements at Routes 5 and 9, DelDot's acquisition of land on the subject property to complete these improvements, and DelDot's reconfiguration of the entrance to the property as part of the re-design of the intersection.
 - b. The need for the variance is due to the unique size, shape and location of the property, especially as it has been impacted by the intersection improvements.
 - c. The setback variance along Route 9 will not adversely affect the essential character of the neighborhood for several reasons, including: (i) the property has historically been used as a gas station; (ii) the encroaching canopy replaces one that previously existed on the property with even greater encroachments than the one proposed by the applicant; and (iii) the redevelopment of the property as a new convenience store with gas pumps and more controlled access will be an improvement that will benefit the character of the neighborhood.
 - d. Due to the uniqueness of this situation and the Property, the Property cannot be developed in strict conformity with the Sussex Zoning Code. The size of the property, the DelDOT acquisitions for the intersection improvements, stormwater management requirements for any development of the property, and parking and traffic flow

requirements for any commercial use of the property affect the development of the property in strict conformity with the Code.

- e. For these same reasons, the variance is necessary to enable the reasonable use and redevelopment of the Property. The variance will also allow the property to be redeveloped as a safer gas station and convenience store than what currently exists on the site, with controlled ingress and egress to the property.
- f. The variance is the minimum amount necessary to affect the necessary relief to the applicant.
- g. For all of the foregoing findings, there is an exceptional practical difficulty that supports the grant of the front yard variance along Route 9 for a fuel tank canopy.

Based on the foregoing, the Board approved the variance from the front yard setback requirement for a fuel tank canopy pursuant to Sections 115-82, 115-83.8 and 115-185.

Decision of the Board

Upon motion duly made and seconded, the variance from the front yard setback requirement for a fuel tank canopy pursuant to Sections 115-82, 115-83.8 and 115-185 was approved. The Board Members in favor of the approval were Mr. Dale Callaway, Mr. Jeff Hudson, Mr. Norman Rickard, Mr. Brent Workman and Ms. Ellen Magee.

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 November 7, 2017.