

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

**IN RE: JASON M. HARSHBARGER**

**(Case No. 12015)**

A hearing was held after due notice on September 11, 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 appeal of a determination by the Planning & Zoning Director regarding an application for a special use exception to place a modular home in a mobile home park.

Findings of Fact

The Board found that the Appellants filed an appeal of a determination by the Planning & Zoning Director regarding an application for a special use exception to place a modular home in a mobile home park. This application pertains to certain real property located on the south side of South Shore Drive Ext., approximately 432 feet south of Marina View Court (911 Address: 32 South Shore Drive, Bethany Beach); said property being identified as Sussex County Tax Map Parcel Number 1-34-2.00-3.01 & 4.00. After a hearing, the Board made the following findings of fact:

1. The Board was given copies of the appeal, a letter from Planning & Zoning Director Janelle Cornwell dated June 15, 2017, and a portion of the tax map of the area.
2. The Board found that the Office of Planning and Zoning received no letters regarding the appeal.
3. The Board found that Jason Harshbarger, Stacey Harshbarger, Adam Rones, and Tom Ferdig were sworn in to testify regarding the appeal of a determination by the Planning Director. Mr. Rones submitted pictures and exhibits to the Board to review.
4. The Board found that Mr. Rones testified that the Appellants are appealing the decision of the Planning & Zoning Director to not allow them to file an application for a special use exception to place a modular home on the Property.
5. The Board found that Mr. Rones testified that the Property is located in South Shores Marina which was previously known as Rock Turn Manufactured Home Park and Simpsons Manufactured Home Park. The Property is located near the marina near Indian River Inlet.
6. The Board found that Mr. Harshbarger testified that he recently acquired the Property as a second home and the Property previously had a double-wide mobile home on pilings. The Appellants believed that they could construct a new home on the Property. He noted that the Property is leased pursuant to a 99 year lease. The Property is owned by Simpsons Mobile Home Park and John Kerr is the trustee for the landlord. The Appellants paid \$350,000 for the lease and the damaged mobile home.
7. The Board found that Mr. Harshbarger testified that the Property was acquired as part of a bank foreclosure and the previous home was damaged and neglected. The previous home had a hole in the roof which was covered by a tarp, which led to mold and water damage to the inside of the home. The home was uninhabitable and removed.
8. The Board found that Mr. Harshbarger testified that the Appellants consulted with their realtor and contractor and were under the impression that they could construct a modular home on the lot.

9. The Board found that Mr. Harshbarger testified that there are 4 other stick-built or modular homes located in the neighborhood and those homes were unanimously approved by the Board.
10. The Board found that Mr. Harshbarger testified that the first home was built by Jack Parker in November 2005. The second case was heard on February 6, 2012 (Case No. 10935) for the Golding family. The third case was Case No. 11098 for Bayside Homes and the fourth case was Case No. 11377 for the DeCristo family.
11. The Board found that Mr. Harshbarger testified that, during the discussion in Case No. 11098, Mr. Rickard asked counsel if the Board could determine that a stick-built or modular home can be placed in a manufactured home park and counsel replied that he presumed that the then-Planning & Zoning Department determined that the Applicant could apply and the Planning & Zoning Director responded by acknowledging that there have been 2-3 other stick-built or modular homes approved in the community. The Appellants believe this discussion justifies their request.
12. The Board found that Mr. Harshbarger testified that the home would be constructed to code and would not substantially affect adversely the uses of neighboring and adjacent properties.
13. The Board found that Mr. Harshbarger testified that the proposed home will improve property values in the neighborhood.
14. The Board found that Mr. Harshbarger testified that the modular home has been constructed and is at the manufacturer's warehouse. The home has not been placed on the lot.
15. The Board found that Mr. Harshbarger testified that the Appellants have invested over \$459,000 into the Property.
16. The Board found that Mr. Harshbarger testified that the builder applied for a building permit but was denied due to the zoning classification and the Planning & Zoning Director would not allow them to apply for a special use exception.
17. The Board found that Mr. Harshbarger testified that none of the property owners in the community have received notice from Sussex County that there has been a change in the interpretation of the Code and the community supports the appeal.
18. The Board found that Mr. Harshbarger testified that the values of land have grown. Other lots in the neighborhood are for sale at \$350,000.
19. The Board found that Mr. Rones testified that many of the homes in the community are mobile homes which have been improved by additions over time and the new construction in the area have been similar to the home proposed by the Appellants. There have not been new mobile homes placed in the community.
20. The Board found that Mr. Rones testified that the previous mobile home was attached to a steel chassis which was welded to steel beams and attached to the pilings and that new pilings are needed.
21. The Board found that Mr. Harshbarger testified that new pilings on the same footprint will be installed.
22. The Board found that Mr. Rones testified that the footprint of the home will not change but the elevation of the home will change.
23. The Board found that Mr. Rones testified that there had been no inquiry with the Planning & Zoning Department prior to ordering the home and no permits were issued prior to ordering the home. He assumed that the process would be similar to the other homes in the community and the Appellants would be able to apply for a special use exception.
24. The Board found that Mr. Rones testified that the Appellants were aware that there was a risk that the special use exception could be denied and that, in hindsight, there was great risk in ordering the home prior to receiving the special use exception.

25. The Board found that Mr. Rones testified that he did not recall one of the prior cases for a neighboring property when initially discussing the project with the Appellants and, had he recalled that case, things may have played out differently.
26. The Board found that Mr. Harshbarger testified that the home was ordered in May 2017.
27. The Board found that Mr. Harshbarger testified that 23.5% of the homes in the community are similar to the home proposed by the Appellants. There are 18 homes in the community and 2 vacant lots.
28. The Board found that Mr. Rones testified that some of the neighbors are in a similar situation as the Appellants and the Appellants are somewhat trailblazing for other neighbors who may seek similar relief.
29. The Board found that Mr. Rones testified that he is aware that approvals for neighboring properties does not necessarily mean that approval would be granted for this project and that there was implied risk with this project.
30. The Board found that Janelle Cornwell was sworn in and testified about her decision as Planning & Zoning Director.
31. The Board found that Ms. Cornwell testified that the Property in question is considered a manufactured home park and a manufactured home park is allowed 1 stick-built dwelling which is typically used for the park manager.
32. The Board found that Ms. Cornwell testified that a manufactured home is defined as "a movable or portable dwelling not less than 450 square feet in size, constructed to be towed on its own chassis, connected to utilities and designed with or without a permanent foundation for year-round occupancy, which can consist of one or more components that can be retracted for towing purposes and subsequently expanded for additional capacity or of two or more units separately towable but designed to be joined into one integral unit".
33. The Board found that Ms. Cornwell testified that the Appellants proposed to place a modular home on the site and the Sussex County Code treats modular homes like stick-built homes which must comply with the building code. The County has different application processes for modular homes and manufactured homes.
34. The Board found that Ms. Cornwell testified that the relief sought by the Appellants is not available and the Appellants are seeking what, in essence, is a use variance. The Board is not authorized to grant use variances.
35. The Board found that Ms. Cornwell testified that she was not employed in the Planning & Zoning Department when the previous cases came through so she cannot testify as to the situations of those cases but there is no section in the Sussex County Zoning Code that allows for a special use exception for a modular home in a manufactured home park.
36. The Board found that Ms. Cornwell testified that the Planning & Zoning Department recently had a case where someone requested permission to build a second stick-built home in a manufactured home park and the Department told the party that this use was not permitted. The party converted the existing stick-built structure into a community facility for the residents and constructed a new stick-built home, which was permissible since the park contained only 1 stick-built home.
37. The Board found that Ms. Cornwell testified that the decision related to this appeal would impact other manufactured home parks and at what point does the manufactured home park become a subdivision.
38. The Board found that Ms. Cornwell testified that there are different regulations for manufactured home parks and subdivisions; particularly as to lot size and width requirements.
39. The Board found that Ms. Cornwell testified that Swann Keys and Cape Windsor are examples of communities which have converted from manufactured home parks to fee-simple lots and homeowners within those communities have repeatedly applied to the Board for variances.

40. The Board found that Ms. Cornwell testified that the Property is zoned MR and the park is considered a non-conforming manufactured home park. Manufactured home parks are not permitted in the MR zoning district and the park cannot be converted into a subdivision because manufactured homes are not permitted uses in the MR district. The Property has always been treated as a manufactured home park as the park pre-existed the enactment of the Sussex County Zoning Code.
41. The Board found that Ms. Cornwell testified that the Appellants came to the County for a permit and were denied. The Appellants came to the Planning & Zoning Department for a special use exception and the application was returned to them because the Department could not process the application. She then submitted a letter to the Appellants explaining the Department's decision.
42. The Board found that Ms. Cornwell testified that, at that time, the modular home was scheduled to be delivered within 2-3 weeks and it was clear that the home had been ordered prior to discussions with the County about whether the home would be permitted.
43. The Board found that Ms. Cornwell testified that the Department has concerns about the impact of this decision regarding other manufactured home parks in the County.
44. The Board found that Ms. Cornwell testified that the Code only allows for 1 stick-built home in a manufactured home park. The Code has always limited a mobile home park to having only 1 stick-built home.
45. The Board found that Ms. Cornwell testified that the park would have to go through a major subdivision process to convert the park to a fee simple subdivision but manufactured homes are not permitted in the MR zoning district. There may not be, however, enough land to create a fee simple subdivision with the same number of lots as the manufactured home park. In order to meet the lot size requirements for a subdivision, each lot would need to have 10,000 square feet with 100 feet of road frontage. Lots in a mobile home park only need to have 5,000 square feet with 50 feet of road frontage.
46. The Board found that Ms. Cornwell testified that the Appellants could still put a mobile home on the lot but would have to meet any flood plain requirements.
47. The Board found that Ms. Cornwell testified that there are at least 2 different tax map parcel numbers for the park.
48. The Board found that Mr. Harshbarger testified that the land lease specifically states that, when the lease is transferred, a stick-built or modular home must be placed on the lot.
49. The Board found that Mr. Rones testified that MR zoning does not allow for mobile homes so there is no path to avoid this dilemma if residents want to convert the park into a subdivision.
50. The Board found that Mr. Rones testified that lots in the park are under 10,000 square feet.
51. The Board found that Ms. Cornwell testified that the park is considered a mobile home park so the Appellants could place a mobile home on the lot. The park owner could seek a change of zone but it may be difficult to convert the park to a fee simple subdivision for the same number of lots due to the lot size and road frontage requirements of a subdivision.
52. The Board found that Mr. Rones testified that the larger homes in the park changed the value and character of the neighborhood.
53. The Board found that Steven Golding, Rob Startzel, and Andrea Doyle were sworn in and testified in support of the Appellant. Mr. Golding submitted photographs to the Board.
54. The Board found that Mr. Golding testified that he lives next door to the Property and he previously received approval to construct a stick-built home on his lot.

55. The Board found that Mr. Golding testified that he is President of the homeowners association and he speaks on behalf of the association's board of directors in his support of the Appellants.
56. The Board found that Mr. Golding testified that the Property will be left vacant if the special use exception is denied and the County should want the tax revenue from a stick-built dwelling rather than a mobile home. The residents improve the local economy.
57. The Board found that Mr. Golding testified that the park is in a flood zone and homes are constructed to meet flood zone requirements. Homes must be FEMA compliant in order to receive financing.
58. The Board found that Mr. Golding testified that the park is nothing like it was originally intended.
59. The Board found that Mr. Golding testified that the leases include a list of obligations.
60. The Board found that Mr. Golding testified that it was always understood that the community would evolve from a manufactured home park to a stick-built home community.
61. The Board found that Mr. Golding testified that there are 15 manufactured homes in the community.
62. The Board found that Mr. Starzell testified that he lives in the park. He has a doublewide that was built in 1985 and is in disrepair which does not make sense to further renovate. He wants to build the safest, most storm-resistant house possible and a modular home meets those requirements more than a manufactured home.
63. The Board found that Mr. Starzell testified that the lease requires that his manufactured home must be replaced with a modular or stick-built home.
64. The Board found that Ms. Doyle testified that she purchased her doublewide home in 2013 and she was always under the assumption that she could replace her home with a modular or stick-built home. She uses her home and has many guests to her home but, if she cannot build a larger home, she may not be able to use her property.
65. The Board found that Ms. Doyle testified that larger homes will bring in larger tax revenues.
66. The Board found that Mr. Harshbarger testified that that he spoke with the landlord about this appeal. The landlord, who resides in Florida, supports the appeal.
67. The Board found that Mr. Rones testified that the lease provisions may be a response to the MR zoning district requirements.
68. The Board found that Mr. Harshbarger testified that the Appellants found out about the zoning issue in May 2017.
69. The Board found that Ms. Cornwell testified that the County has not made attempts to contact the landlord and the County was just made aware of the lease provision at this hearing.
70. The Board found that Ms. Cornwell testified that she issued her decision in June 2017 and the issue arose a few weeks prior to that decision as the County was reviewing options available to the Appellants.
71. The Board found three (3) parties appeared in support of the appeal.
72. The Board found no parties appeared in opposition to the appeal.
73. The Board tabled the discussion on the appeal until September 18, 2017.
74. Based on the findings above and the testimony and evidence presented at the public hearing and the public record, which the Board has weighed and considered, the Board affirms the Director's decision and denies the appeal. The findings below support the Board's decision.
  - a. The Appellants lease a lot in Simpsons Mobile Home Park, which is a non-conforming mobile home park that predates the enactment of the Sussex

County Zoning Code. The Property is in the MR Zoning District and a mobile home park would otherwise be prohibited in this zoning district. The Park consists of primarily manufactured homes but there are a few stick-built and modular homes in the community.

- b. At issue before the Board is whether the Appellants should be permitted to file with the Board a special use exception application to place a stick-built home on the Property. Sussex County Planning & Zoning Director Janelle Cornwell issued a well-reasoned decision dated June 15, 2017 ("the Decision"), consistent with the Sussex County Zoning Code which denied the Appellants the opportunity to file that application. As noted above, the Board affirms that decision.
- c. The facts are clear that the Property is located in a pre-existing, non-conforming manufactured home park subject to the provisions of Sussex County Code §115-172(g). Pursuant to §115-172(g)(12), homes within a manufactured home park must be a "manufactured home" or an "authorized manufactured home". A manufactured home is defined as "a movable or portable dwelling not less than 450 square feet in size, constructed to be towed on its own chassis, connected to utilities and designed with or without a permanent foundation for year-round occupancy, which can consist of one or more components that can be retracted for towing purposes and subsequently expanded for additional capacity or of two or more units separately towable but designed to be joined into one integral unit." See Sussex County Code §115-4(b). An authorized manufactured home is similarly defined in Sussex County Code §115-172(g)(12). Neither definition allows for a modular home as proposed by the Appellants. The Appellants presented no convincing and substantial evidence that the proposed home somehow falls within the Code's definition of a manufactured home. Rather, the Appellants made no effort to contest the Director's decision that the proposed home was not a manufactured home.
- d. The Board also finds that a manufactured home park is defined as "any tract of land used or offered for use for the location of manufactured homes of other ownership to be occupied as dwellings." See Sussex County Code §115-4(b) (emphasis added). It is, thus, clear that a manufactured home park must be used for the placement of manufactured homes and not stick-built or modular dwellings which are, more or less, permanent structures.
- e. The Appellants raised the argument that the Board has previously granted special use exceptions for the placement of modular homes in a manufactured home park. While it is true that such approvals have been granted in extremely limited cases, the Sussex County Code does not allow for such approval. The Board notes that a previous application cited by the Appellants (Case No. 10935) was for a lot also located in this manufactured home park. Ironically, the property in question with that application has the exact same tax map parcel number as the property involved with this appeal. In other words, Sussex County makes no such distinction within its records of the lots within the manufactured home park because the manufactured home park itself is considered one or two parcels. This fact further supports the position that the manufactured home park is a manufactured home park subject to the requirements of Sussex County Code §115-172(g).
- f. The Board found no provision of the Code and the Appellants failed to direct the Board to or cite a provision of the Code which permits the relief sought by the Appellants. This finding is particularly important since §115-15 of the Code provides that "unless the contrary is clear from the context of the lists or other regulations of this chapter, uses not specifically listed are

prohibited.” In other words, the Code is clear that, if there is no provision of the Code authorizing the proposed special use exception, the proposed use is prohibited. In other jurisdictions, a property owner may have relief from such zoning limitations by applying for a use variance which is sometimes used to provide relief where a property owner has no other relief in the Code. The Board, however, is statutorily prohibited from granting use variances. See 9 Del. C. § 6917. This prohibition further underscores the limited options available to the Appellants.

- g. The Appellants and their supporters have raised several other arguments as to why the appeal should be granted. These arguments, however, fail to convince the Board that the relief to which the Appellants seek is available in the Sussex County Zoning Code. Arguments that the homes will increase tax revenues to the County are simply irrelevant to the issue at hand. The impact on tax revenues has nothing to do with whether the Code has a provision that allows the Appellants to seek this special use exception. Likewise, the purported requirements in the lease that the Appellants must replace any manufactured home with a stick-built or modular home are also irrelevant. The County does not enforce lease provisions. While it appears that the Appellants’ landlord may have inserted clauses in its leases which run contrary to the permitted zoning use of the lots in the community, this, again, has no bearing on whether there is relief for the Appellants in the Code. Issues with the lease are matters the Appellants may wish to raise with the landlord. Nonetheless, those issues are outside the Board’s jurisdiction.
- h. While the Board sympathizes with the Appellants who apparently relied on their realtor and contractor when deciding to place the home on the Property, it is also clear that the Appellants made no effort prior to ordering the home to contact the Sussex County Planning & Zoning Department to determine if the proposed home would meet the applicable zoning laws. The Appellants’ contractor, Mr. Rones, flatly admitted that the Appellants assumed “great risk” in ordering the home prior to making these inquiries. The Appellants’ decision to proceed down this path is a classic example of someone who has placed the proverbial cart before the horse. Perhaps, most important, is the fact that the Appellants knew or should have known – as their contractor was clearly aware – that, even if they were allowed to file the requested application, there was absolutely no guarantee that the special use exception would be granted. Quite simply, the Appellants took a great risk in ordering the home without doing the necessary homework.
- i. The Appellants also argue that they have detrimentally relied on the previous decisions of the Board. This argument, however, runs contrary to Mr. Rones’ testimony that he was not aware of the prior decisions when the home was ordered. Rather, it appears as though the Appellants sought to justify their decision to file the application after-the-fact.
- j. Assuming, *arguendo*, that Mr. Rones or the Appellants were previously aware of those prior decisions, it is the responsibility of the property owner or, as in this case, the leaseholder, to know the zoning regulations and how they affect the property in question. There are relatively few, if any, cases where a landowner will not be held responsible for knowing what the applicable land restrictions are. In this case, the Appellants provided no citations to the Sussex County Zoning Code which would provide support for their claims that the Code provides them the relief sought. If, assuming *arguendo*, the Appellants relied on the prior decisions of the Board, and were then unable to find support within the Code, the Board would, at a minimum, expect the Appellants to consult (prior to ordering the home) with

the Planning & Zoning Department to determine why a discrepancy between the earlier approvals and the Code exist. In this case, however, it is clear that the home was ordered without such due diligence.

- k. The Board also finds that the Director's interpretation is consistent with more recent interpretations by the Planning & Zoning Department. As noted in Ms. Cornwell's testimony, a similar situation arose in a different manufactured home park where a party sought to place a second stick-built home in the community but was not permitted to do so. Rather, the existing stick-built home was converted into a community center for the park residents and a new stick-built home was created. The Director's decision in that case is similar to the decision in this case – a manufactured home park is only permitted to have one stick-built or modular home. The Board also finds that the Director explored other options which may be available to the Appellants prior to rendering her decision. Unfortunately for the Appellants, the Code simply does not provide the relief they seek.
- l. It is not as though the Appellants are without a remedy; even if that remedy may not be preferred by the Appellants. Ms. Cornwell made it clear that the Appellants could place a manufactured home on the lot. This use would be consistent with the historic use of the lot. Alternatively, the Appellants could meet with other leaseholders and their landlord to see if the park could otherwise be developed. Such a remedy, of course, would require some form of zoning approval from Sussex County and is certainly not guaranteed.
- m. The Board is also concerned about the potential impact that the granting of this appeal and a possible approval of the special use exception would have on the Sussex County Zoning Code. Simpsons Manufactured Home Park is one of many such parks in Sussex County and the Code substantially differentiates the provisions for the creation of fee simple lots versus the creation of manufactured home park lots. The most notable difference is the size and width of the lots. Other subdivision regulations for fee simple lots include road width and storm water management requirements would be ignored if development of the manufactured home park continued as suggested by the Appellants. A subdivision of fee simple lots must go to the Planning & Zoning Commission for approval and the property owner has many requirements to meet. If the Appellants were permitted to develop the lot as proposed, it is abundantly clear that others in the neighborhood would do the same. In turn, this would effectively create a subdivision of permanent structures rather than a manufactured home park. This "subdivision" would not, however, have been required to go through the normal procedure for subdivision approval; thereby negating the impact of the Sussex County subdivision regulations. Sussex County has enacted different regulations for fee simple communities and manufactured home communities because they are different uses and have different needs. The Appellants' proposed use certainly threatens and jeopardizes those uses.
- n. Ultimately, the Board affirms the Director's decision for the reasons set forth in the Decision and these Findings of Fact.

The Board affirmed the decision of the Planning & Zoning Director and denied the appeal.

#### Decision of the Board

Upon motion duly made and seconded, the decision of the Planning & Zoning Director was affirmed and the appeal was denied. The Board Members in favor of the Motion were Mr. Dale Callaway, Ms. Ellen Magee, Mr. John Mills, and Mr. Brent



Workman. No Board Member voted against the Motion to deny the appeal and to affirm the decision of the Planning & Zoning Director. Mr. Norman Rickard did not participate in the vote on this appeal.

BOARD OF ADJUSTMENT  
OF SUSSEX COUNTY

  
Dale Callaway  
Chairman

Date November 21, 2017