

BEFORE THE BOARD OF ADJUSTMENT OF SUSSEX COUNTY

IN RE: JOHN YENISH & GLORIA YENISH

(Case No. 12022)

A hearing was held after due notice on September 18, 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 rear yard setback requirement.

Findings of Fact

The Board found that the Applicants are seeking a variance of 7.2 feet from the ten (10) feet rear yard setback requirement for an existing deck. This application pertains to certain real property located on the north side of Owl Drive, approximately 150 feet west of West Fenwick Boulevard. (911 Address: 36996 Owl Drive, Selbyville); said property being identified as Sussex County Tax Map Parcel Number 5-33-12.00-721.00.

1. The Board was given copies of the Application, a portion of the tax map of the area, a building permit, inspection records, a letter from Manaen Robinson, Esquire, and a survey dated June 29, 2017.
2. The Board found that the Office of Planning & Zoning received one (1) letter of support of and no correspondence in opposition to the Application.
3. The Board found that John Yenish was sworn in to testify about the Application. Manaen Robinson, Esquire, presented the case on behalf of the Applicants and submitted exhibits for the Board to review.
4. The Board found that Mr. Robinson stated that the Applicants purchased the Property in the Swann Cove subdivision on July 14, 2017.
5. The Board found that Mr. Robinson stated that a survey completed just before settlement showed that the deck on the back of the home encroaches into the rear yard setback. The deck is 2.8 feet from the rear property line and it is required to be 10 feet from the rear property line.
6. The Board found that Mr. Robinson stated that the Property is unique because the lot is small and there is not a lot of room for improvements other than the house itself.
7. The Board found that Mr. Robinson stated that the deck was constructed by the prior owner in 2016.
8. The Board found that Mr. Robinson stated that, if the variance is not granted, the Applicants will be required to destroy a portion of the deck to come into compliance with the Code and this situation would create a significant expense and would remove a portion of the improvement for which the Applicants paid for when they bought the home.
9. The Board found that Mr. Robinson stated that the variance is necessary to enable reasonable use of the Property because the Applicants cannot maintain the existing deck on the Property without the variance.
10. The Board found that Mr. Robinson stated that, if the variance is not granted, the deck would become a undue hardship and expense.
11. The Board found that Mr. Robinson stated that the problem was not created by the Applicants because, at the time they purchased the Property, the deck was already constructed by the previous owner Robert Wentz. Mr. Wentz received a permit for the deck but a certificate of compliance was never issued.
12. The Board found that Mr. Robinson stated that the variance will not alter the character of the community or impair the use or development of neighboring properties.

13. The Board found that Mr. Robinson stated that the Applicants are seeking the minimum variance of 7.2 feet which would allow the deck to remain in its current location.
14. The Board found that Mr. Yenish affirmed the statements made by Mr. Robinson as true and correct. Mr. Yenish testified that he never received any complaints from neighbors about the deck.
15. The Board found that Anthony Morgan III was sworn in and testified against the Application.
16. The Board found that Mr. Morgan testified that he owns the property behind the Applicant's lot.
17. The Board found that Mr. Morgan testified that the previous owner of the Property constructed the deck and other improvements, such as a raised planter, to make the Property look larger than it actually is. He approached the previous home owner about the shared property line and the previous property owner stated he had a permit and a certificate of compliance for the deck. Mr. Morgan proceeded to obtain a survey for his property because he intends to build a home and wanted to verify that the home would meet all setback requirements. He discovered that the deck is 30 inches from his property line and he notified the realtor selling the Property of the encroachment.
18. The Board found that Mr. Morgan testified that the lots are small and he will have to build his home to meet the setback requirements.
19. The Board found that Mr. Morgan testified that he is concerned about the closeness of the deck to his property and the effect it will have on the ability to sell his home. His major concern is that buyers will not be interested in the home because of the proximity of the deck.
20. The Board found that Mr. Morgan testified that he believes there is money in escrow from settlement to pay for expenses related to the removal of the deck.
21. The Board found that Mr. Morgan testified that he would like the deck to meet the setback requirements.
22. The Board found that Mr. Robinson stated that he feels his client meets all the criteria for granting a variance and that the problem was not created by the Applicants but was created by the previous owner.
23. The Board found that Mr. Robinson stated that Mr. Morgan was speculating that the deck would cause an issue for him to sell his property.
24. The Board found that Mr. Robinson stated that he did not handle the settlement for the Applicants but there is money in escrow set aside to bring the deck into compliance with the setback requirements.
25. The Board found that Mr. Yenish testified that he does not know how difficult it would be to bring the deck into compliance with the Code.
26. The Board found that Mr. Yenish testified that the Property has other problems such as flooding due to the grading on neighboring lots.
27. The Board found that Mr. Yenish testified that the realtor told the Applicants that, if the variance was granted, he would not have to do anything but he was aware that a variance would be needed in order for the deck to remain. If the variance is not granted, there is money in escrow to take care of the deck.
28. The Board found that no parties appeared in support of the Application.
29. The Board found that one (1) party appeared in opposition of the Application.
30. Based on the findings above and the testimony and evidence presented at the public hearing and the public record, which the Board weighed and considered, 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 Board was not convinced that there was some unique physical condition related to the Property which has created an exceptional practical

difficulty. The Property is a rectangular lot as shown on the survey provided by the Applicants. No evidence was presented which convinced the Board that the Property has some unique, natural feature which has created an exceptional practical difficulty for the Applicants. Conversely, the difficulty, if any, appears to be entirely self-created by the Applicants' desire to exceed the setback requirements set forth in the Sussex County Zoning Code.

- b. The Board finds that the Property is already being used in strict conformity with the Sussex County Zoning Code and that the variance is not necessary for the reasonable use of the Property. The Property is already developed in compliance with the Code by an existing dwelling and the deck is not necessary to afford reasonable use of the Property. Assuming, *arguendo*, that a deck was necessary to afford reasonable use of the Property, the Board was not convinced that a deck which encroaches 7.2 feet into the rear yard setback area was necessary. A deck may encroach up to 5 feet into the setback area and the Board was not convinced that a deck which would otherwise meet the Code requirements would not afford the Applicants with reasonable use of a deck. The Applicants' desire for a larger deck clearly appears to be a "want" rather than a "need." The Property is already being reasonably used and the variance is denied. The Board also notes that the Applicants have money in escrow to pay for the costs of bringing the deck into compliance with the Code.
- c. The exceptional practical difficulty was created by the Applicants. As previously discussed, there are no unique conditions to the Property which have otherwise created an exceptional practical difficulty. Rather, the difficulty, if any, appears to be entirely self-created by the Applicants' desire to exceed the setback requirements set forth in the Sussex County Zoning Code. The Applicants can clearly use the Property without the need for a variance. While the Applicants did not place the deck on the Property, the Applicants have money in escrow to bring the deck into compliance but chose to seek a variance instead.
- d. The Board has concerns about the impact of the deck on the adjacent property. As proposed, the deck would be less than three feet away from neighboring properties and the Board finds the testimony of the neighboring property owner convincing that the proximity of the deck so close to his property line may have a detrimental effect on the uses – particularly the sale of a home – on the neighboring property.
- e. Since the variance is not necessary to enable the reasonable use of the Property, the Board also finds that the variance requested is not the minimum variance necessary to afford relief. Furthermore, the Board finds that no variance is necessary to afford relief since the Property can be developed in strict conformity with the Sussex County Zoning 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

Dale Callaway
Chairman

If the use is not established within one (1)
year from the date below the application
becomes void.

Date November 21, 2017