

BEFORE THE BOARD OF ADJUSTMENT OF SUSSEX COUNTY

IN RE: JOHN CASSIE & ROE CASSIE

(Case No. 12159)

A hearing was held after due notice on June 18, 2018. The Board members present were: Mr. Dale Callaway, Mr. Bruce Mears, Ms. Ellen Magee, Mr. John Mills, and Mr. Brent Workman.

Nature of the Proceedings

This is an application for variances from the front yard and rear yard setback requirements.

Findings of Fact

The Board found that the Applicants are seeking a variance of 0.2 feet from the thirty (30) feet front yard setback requirement for an existing dwelling and a variance of 4.5 feet from the fifteen (15) feet rear yard setback requirement for an existing two-story deck. This application pertains to certain real property on the north side of Hayes Avenue, approximately 268 feet west of Jefferson Avenue. (911 Address: 13030 Hayes Avenue, Selbyville); said property being identified as Sussex County Tax Map Parcel Number 5-33-20.19-55.00.

1. The Board was given copies of the Application, a temporary Certificate of Occupancy, the application for Case No. 11852, minutes and findings of fact for Case No. 11852, a site plan dated September 15, 2015, a survey of the Property dated November 2, 2017, complaint information forms, pictures of the Property, a Sussex County violation notice, a building permit, an aerial photograph of the Property, and a portion of the tax map of the area.
2. The Board found that the Office of Planning & Zoning received no correspondence in support of the Application and five (5) letters in opposition to the Application.
3. The Board found that John Cassie, Roe Cassie, Richard Evans, Anthony Balsamo, and Russell Hammond were sworn in to testify about the Application. Tim Willard, Esquire, presented the case on behalf of the Applicants and submitted exhibits for the Board to review.
4. The Board found that the Applicants, through their builder Anthony Balsamo, previously sought variances for the Property related to the construction of a dwelling and related features. Those variances included a variance of seven (7) feet from the thirty (30) feet front yard setback requirement for a proposed dwelling, a variance of four (4) feet from the ten (10) feet side yard setback requirement on the west side for a proposed outside shower, and a variance of five (5) feet from the twenty (20) feet rear yard setback requirement for a proposed deck and porch. The prior case (Case No. 11852) was denied on the Board on October 3, 2016.
5. The Board found that Mr. Evans testified that he is a draftsman and he designs residential homes in the area. He has been in business of drafting residential plans since 1994 and he was retained to design building plans for the Property. He does not perform surveying work.
6. The Board found that Mr. Evans testified that the dimensions of the dwelling were originally 30 feet wide by 51.3 feet deep with a ten (10) feet deck. After the previous variance request was denied, the house plans were revised. The house was moved closer to the rear by approximately 7 feet and the dimensions of the dwelling were reduced. The dwelling is now 49.3 feet deep and is a Cape Cod style home.
7. The Board found that Mr. Evans testified that there was a discrepancy as to the size of the rear yard setback requirement. The survey showed the rear yard setback requirement as 10 feet when the actual rear yard setback requirement was 20 feet

- with an allowance of a 5 feet encroachment for first-floor decks.¹ According to Mr. Evans, when he redesigned the dwelling, he called staff at Planning and Zoning and was told that the rear yard setback was 10 feet and he modified the plans to meet that setback. The design was based on request and information from the surveyor and builder.
8. The Board found that Mr. Cassie testified that he was aware that the builder sought variances for the previous plans and was denied. He then worked with his builder and architect to redesign the plans. During this process, he relied on his builder, surveyor, and architect and he believed that he would not need a variance after the plans were redesigned. According to Mr. Cassie, he was unaware of the encroachments until he received a violation notice from the County last summer; at which time he told his builder to stop construction immediately to see what needed to be done. His builder told him that the issue was that the County thought the second floor deck would enclose the first-floor deck but there is no enclosure to the decks and he was under the impression that a balcony over the first-floor deck was not considered an enclosure. Mr. Cassie was told by his builder that the issue regarding the violation notice had been straightened out.
 9. The Board found that Mr. Balsamo testified that he presented the original variance request and that, after the original variance request was denied, he reached out to the Applicants, the architect, and the surveyor. The home was then redesigned and plans were submitted to the County. The surveyor staked out the new house to be built and the footers were inspected and approved by Building Code. He was not aware that these variances were needed until after the house was built.
 10. The Board found that Mr. Hammond testified that he based the setbacks for the Property off other surveys he prepared in the area and that he made an error by not checking with the County to verify the setback requirements.
 11. The Board found that Mr. Hammond testified that he worked with the owner and builder on the plan and he staked out the foundation for the house at a thirty (30) feet front yard setback after the plans were redesigned following the denial of the original variance. He did not return to the site until after the dwelling was completed, at which time, he performed an as-built survey and he measured from the exterior corners and not the foundation. He believes that the front yard setback encroachment may have been an error made during construction.
 12. The Board found that Mr. Evans testified that, when the house was redesigned, the dwelling was moved towards the rear, the outdoor shower was removed, the depth of the dwelling was reduced, the porch was converted to a deck, and changes were made to the stairs.
 13. The Board found that Mr. Balsamo testified that the front of the dwelling cannot be brought into compliance. Mr. Evans agrees. The front yard encroachment is due to the siding which was a builder error. With regard to the rear yard encroachment, he would have to change the structure of the entire top deck in order to bring it into compliance since the top deck is not cantilevered. If a portion of the top deck was removed, there would be a six feet by six feet post in the middle of the first floor deck in order to support the shortened second story deck. The shortening of the second-floor deck would also require the complete reconstruction of both the first-floor and second-floor decks.
 14. The Board found that Mr. Willard stated that the subdivision was created in 1966 and is a non-conforming subdivision. The restrictive covenants for the community set forth a rear yard setback of 10 feet.

¹ The Board notes that, at the time the dwelling was constructed the rear yard setback requirement was 20 feet with an allowance of a 5 foot encroachment for first-floor decks. Earlier this year, Sussex County Council passed Ordinance No. 2557 which reduced the rear yard setback requirements for undersized lots, such as the Applicants' lot, to 15 feet. First-floor decks are allowed to encroach an additional 5 feet into the rear yard setback area.

15. The Board found that Mr. Willard stated that the Board has approved multiple variances in the neighborhood and there are about 17-18 homes in the neighborhood which encroach into the twenty (20) feet rear yard setback. There are properties which have been granted rear yard variances in the community but not on Hayes Avenue but there are properties on Hayes Avenue which have received variances.
16. The Board found that Mr. Willard stated that the Board has set a precedent by granting other variances for similar properties in the neighborhood and that there are rear setbacks within the neighborhood that are closer than twenty feet. He believes that these other variances are relevant to the character of the neighborhood. He also noted that there are various types of houses in the neighborhood.
17. The Board found that Mr. Willard stated that the Property is unique because it is an existing non-conforming lot and neighborhood. The lot consists of 5,000 square feet and is zoned AR-1. The Applicants did not create the small lot size.
18. The Board found that Mr. Cassie affirmed the statements made by Mr. Willard as true and correct. Mr. Cassie further testified that he retained professionals to guide the job from start to finish after the denial of Case No. 11852 and that he did not create the need for a variance because he relied on professionals.
19. The Board found that Mr. Cassie testified that the builder recommended the architect and the builder hired the surveyor. The Applicants relied on the architect, builder, and surveyor when the building started.
20. The Board found that Teresa Pyle, Charles Pyle, Charles Meade, and Rosemary Meade were sworn in and testified in opposition to the Application.
21. The Board found that Mrs. Pyle testified that she lives five lots away from the Property and that her lot is small. The lots in the neighborhood measure 50 feet by 100 feet and she believes that the property owner was well aware of the setbacks when building the home. Mrs. Pyle expressed concerns about the risk of fires due to the closeness of the homes and the potential for parking issues.
22. The Board found that Mr. Pyle testified that lives in the neighborhood and that he believes that a dwelling can be constructed in compliance with the Code in order to keep uniformity in the neighborhood.
23. The Board found that Mr. Meade testified that his home was built in 1985 and that the architect and builder he hired knew how to follow the Code. He argued that it is the Applicants' fault for not retaining better professionals because a home can be built there according to the Code. He did note that the Applicants' house is beautiful.
24. The Board found that Mrs. Meade testified that she contacted the County after the home was built to raise concerns about encroachments.
25. The Board found that one (1) party appeared in support of the Application.
26. The Board found that four (4) parties appeared in opposition to the Application.
27. 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 was substantially different from the application presented in Case No. 11852. The Applicants clearly worked with their builder, surveyor, and architect to redesign the building plans after the initial variance requests were denied. This process led to 1) the design of a smaller home which was moved away from the front property line thereby significantly decreasing the front yard encroachment, 2) the removal of an outdoor shower, 3) the reconfiguration of stairs to the home, and 4) the conversion of a proposed first-floor covered porch to a first-floor deck. These changes are substantial and have resulted in a home that is substantially more compliant with the Code than the prior proposed dwelling. These changes merit consideration by the Board as to whether the variances now requested should be approved.
28. 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 met the standards for granting a

variance. The findings below further support the Board's decision to approve the Application.

- a. The Property is unique due to its size. The Property is quite small as evidenced by the survey. The Property is 50 feet wide by 98.18 feet deep and consists of only 4,975 square feet. The unique characteristics of this Property limit the buildable area available to the Applicants and have created an exceptional practical difficulty for the Applicants who seek to retain existing structures on the lot. The Board notes that the difficulty experienced by the Applicants has been exacerbated by the errors made by their builder, architect, and surveyor during the building process. The Applicants clearly relied on those individuals for advice only to later learn of the encroachments.
- b. Due to the uniqueness of the lot, the Property cannot be developed in strict conformity with the Sussex County Zoning Code. The Property has a unique size and the buildable area thereof is limited due to its size. The Applicants seek to retain existing structures on the lot but are unable to do so without violating the Sussex County Zoning Code. The Board is convinced that the variances are necessary to enable the reasonable use of the Property as the variances will allow reasonably sized, existing structures to remain on the lot. The Board is convinced that the shape and location of these structures are also reasonable, which is confirmed when reviewing the survey provided by the Applicants. Lastly, the Board notes that the rear yard variances are for a second-floor deck which overhangs an existing first-floor deck. Ground level decks are allowed to encroach into the setback area and, if there was no second-story deck, a rear yard variance would not be needed. Unfortunately, the second-floor deck cannot be reduced in size to be brought into compliance without substantial reconstruction, including foundational changes, to both decks. Such repair appears to be unduly burdensome and unnecessary; particularly since neither deck is enclosed.
- c. The exceptional practical difficulty was not created by the Applicants. The Applicants did not create the unusual size of the Property. The lot was created in 1965 and predated the enactment of the Sussex County Zoning Code. The unique lot size has resulted in a limited building envelope on the Property and the small building envelope has created the exceptional practical difficulty. The unique characteristics of the Property are clear when reviewing the survey. The Board is convinced that the exceptional practical difficulty was not created by the Applicants but was created the lot's unique characteristics. The Board also notes that the Applicants clearly relied upon the professionals to guide them through the planning process only to later discover the errors.
- d. The variances 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 Board is convinced that the structures will have no effect on the character of the neighborhood. Other similar variances have been granted in the neighborhood and the structures are similar to others in the neighborhood. Concerns raised by opposition as to fires and parking appeared speculative in nature. The concern about fires was particularly perplexing since the structures meet the side yard setback requirements and the encroachments are to the rear yard, which is bordered by a canal, and to the front yard which is bordered by Hayes Avenue. The Board was simply not convinced that the variances would somehow alter the essential character of the neighborhood. The Board also notes that the front yard variance is only 0.2

feet and is likely unnoticeable by neighbors; particularly since the edge of paving of Hayes Avenue does not match the front property line. The Board also notes that there was support from one neighbor who suggested that the dwelling will increase property values in the neighborhood. Even a member of the opposition conceded that the home was beautiful.

- e. The variances sought are the minimum variances necessary to afford relief and the variances requested represent the least modifications possible of the regulations at issue. The Applicants have demonstrated that the variances sought will allow the Applicants to retain existing structures on the lot. No additions or modifications to those structures are needed.

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, Ms. Ellen Magee, Mr. Bruce Mears, Mr. John Mills, and Mr. Brent Workman. No Board Member voted against the Motion to approve the variance application.

BOARD OF ADJUSTMENT
OF SUSSEX COUNTY


John Mills
Chairman

If the use is not established within two (2) years from the date below the application becomes void.

Date September 11, 2018.