

BEFORE THE BOARD OF ADJUSTMENT OF SUSSEX COUNTY

IN RE: OLD ORCHARD VENTURES, LLC

(Case No. 12225)

A hearing was held after due notice on November 5, 2018. The Board members present were: Mr. Dale Callaway, Ms. Ellen Magee, Mr. Bruce Mears, Mr. John Mills, and Mr. Brent Workman.

Nature of the Proceedings

This is an application for a special use exception to operate a convalescent home, nursing home, and / or home for the aged.

Findings of Fact

The Board found that the Applicant is seeking a special use exception operate a convalescent home, nursing home, and / or home for the aged. This application pertains to certain real property located approximately 1,000 feet east of Old Orchard Road and approximately 1,000 feet south of New Road with access off Old Orchard Road (911 Address: N/A); said property being identified as Sussex County Tax Map Parcel Number 3-35-8.00-25.01.

1. The Board was given copies of the Application, a site plan of the Property dated September 7, 2018, 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 or in opposition to the Application.
3. The Board found that Robert Palmer was sworn in to give testimony about the Application. Mr. Palmer is the engineer for the project. Larry Fifer, Esquire, appeared on behalf of the Applicant to present the Application. The Applicant submitted an exhibit booklet to the Board to review.
4. The Board found that Mr. Fifer stated that the skilled nursing facility will be known as "Traquility at Breakwater".
5. The Board found that Mr. Fifer stated that the Property is 1,000 feet from Old Orchard Road and is accessed by Oyster Cove Road.
6. The Board found that Mr. Fifer stated that the area surrounding this property largely consists of residential and medical office uses.
7. The Board found that Mr. Fifer stated that the facility will be used for active seniors. The facility will have a theatre, walking trails, and other amenities. The facility will also have interconnectivity to adjacent parcels.
8. The Board found that Mr. Fifer stated that the Property is ideally suited for this type of facility due to its proximity to doctor's offices, pharmacies, and shopping. There are 4 pharmacies nearby and the Villages at Five Points, which is also located nearby, has shopping. The Property is approximately a half-mile from those facilities. There are shops located along Savannah Road as well.
9. The Board found that Mr. Palmer testified that the facility will consist of 104 rooms and will be a three-story structure. The facility will be modeled after similar structures in the area and will have a mixture of independent and 24 hour care sections. The facility will be considered an "end-of-life" facility with an infirmary and cafeteria.
10. The Board found that Mr. Palmer testified that the Property is landlocked and is accessed from Oyster Cove Drive. There will be inner connectivity with walking paths throughout the Property. The facility will not be seen from Old Orchard Road.
11. The Board found that Mr. Palmer testified that there will be minimal tree removal to retain the original character of the Property.

12. The Board found that Mr. Palmer testified that a portion of the Property was used as a borrow pit and has overgrown, steep slopes. The Applicant intends to improve those slopes with retaining walls.
13. The Board found that Mr. Palmer testified that the Applicant intends to retain the seclusion of the Property and the Applicant intends to minimize clearing of the Property but tree removal is inevitable. When possible, the Applicant intends to replant.
14. The Board found that Mr. Palmer testified that an existing structure previously used as a net house for the menhaden industry will be converted to a community center.
15. The Board found that Mr. Palmer testified that there are only 3 other similar facilities within 5 miles of Beebe Hospital.
16. The Board found that Mr. Palmer testified that the elderly population is projected to greatly increase and the facility is needed due to the large influx of retirees in eastern Sussex County.
17. The Board found that Mr. Palmer testified that the Property is within the Level 2 State Strategies area and the area around the pond is within the Level 3 State Strategies area.
18. The Board found that Mr. Palmer testified that the Applicant intends to construct a grand entrance to give an attractive appearance to the entrance of the facility. The entrance would accommodate a fire truck.
19. The Board found that Mr. Palmer testified that there is a 50 feet wide cross access easement providing access to the Property. A conditional use was granted in July 2016 for a 24 unit duplex on adjacent property and access to the facility will be over that lot.
20. The Board found that Mr. Palmer testified that the facility will comply with storm water regulations. Two ponds are proposed. One pond will be used for a scenic vista and the other pond will have an infiltration basin. Existing wetlands will also be protected.
21. The Board found that Mr. Palmer testified that water and sewer will be public. Tidewater Utilities will provide water and the City of Lewes will provide wastewater services. There are 3 septic tanks on the Property but those tanks will be abandoned. The Applicant has been in contact with Sussex County about interconnection to the Lewes wastewater facility and there is ample capacity for this facility.
22. The Board found that Mr. Palmer testified that the Applicant has met with DeIDOT officials about the project. DeIDOT directed the Applicant to obtain a traffic impact study of 14 intersections. DeIDOT is proposing to realign Old Orchard Road and to make improvements to New Road.
23. The Board found that Mr. Palmer testified that the Applicant proposes a nearby bus stop and will likely have shuttle service.
24. The Board found that Mr. Palmer testified that traffic counts were submitted to DeIDOT today and that the total trip warrants needed to trigger a traffic impact study is 1,000 vehicular trips and this project only results in 315 vehicular trips per day.
25. The Board found that Mr. Palmer testified that medical, grocery, and shopping services are located nearby.
26. The Board found that Mr. Palmer testified that there are no known endangered species on the site.
27. The Board found that Mr. Palmer testified that approximately 38% of the site will be retained as open space.
28. The Board found that Mr. Palmer testified that the facility will meet the objectives of the comprehensive plan.
29. The Board found that Mr. Palmer testified that the facility will not substantially affect adversely the uses of neighboring and adjacent properties.
30. The Board found that Mr. Palmer testified that the facility will be no taller than 42 feet tall and that the area where the building will be located 10 feet lower than neighboring properties due to historical borrowing on the site.

31. The Board found that Mr. Palmer testified that all lighting will be downward screened and shielded and the light impact will be minimal.
32. The Board found that Mr. Palmer testified that the noise generated by the facility will be minimal. There is no expectation of noise other than vehicular traffic.
33. The Board found that Mr. Palmer testified that there are natural buffers from the neighboring development and the trees will provide a visual and noise buffer.
34. The Board found that Mr. Palmer testified that the Applicant anticipates that the facility projects to have more than 75 employees.
35. The Board found that Mr. Palmer testified that he expects some residents to have vehicles but most residents will not.
36. The Board found that four people appeared in support of and five people appeared in opposition to the Application. The following people were sworn in to give testimony in opposition to the Application: Janice Almaris, Robert Viscount, Paul Reiger, and Walter Bahr.
37. The Board found that Ms. Almaris testified that west of the site are 24 proposed townhouses and another nearby site is proposed to have 6 medical and professional buildings.
38. The Board found that Ms. Almaris testified that Old Orchard Road splits the Villages of Five Points, where she lives, and she has concerns about the traffic impact. She wants to have safe access across Old Orchard Road to access her community's amenities. She believes that the development will exacerbate traffic issues along Old Orchard Road and impact the Villages of Five Points. She also noted that there is a proposal to have 2 hotels in the area behind Walgreens and PNC Bank.
39. The Board found that Mr. Viscount testified that the facility is close to neighboring homes and is only 150 yards from the Villages of Five Points. He testified that the Property is not in the middle of nowhere.
40. The Board found that Mr. Viscount testified that the design of the facility looks nice.
41. The Board found that Mr. Viscount testified that Old Orchard Road is being reconfigured and that the speed and traffic along Old Orchard Road is problematic. Old Orchard Road connects New Road and Savannah Road. Neighbors have discussed with DelDOT the traffic along Old Orchard Road. He believes that other projects in the area will change neighborhood traffic patterns and this facility will be in the heart of where there is already an existing traffic problem. DelDOT is doing traffic studies for other projects as well to determine the cumulative effect of traffic.
42. The Board found that Mr. Reiger testified that he is opposed to the Application because he feels it was incorrectly advertised and that he believes the Application should have been posted along Old Orchard Road.
43. The Board found that Ms. Almaris testified that there was a 55,000 square foot fitness center proposed on the other side of the Villages at Five Points and that facility was deemed to be out of character for the neighborhood.
44. The Board found that Ms. Almaris testified that there are single-family homes in the area and that there is commercial property along Old Orchard Road as well.
45. The Board found that Mr. Bahr testified that he is opposed to this Application due to the size of the building and all the development in the area. He argued that there are no three-story buildings in the area and that the facility will be larger than the Shell We Bounce facility. He also noted that there are 6 developable properties in the area – two of which are commercial.
46. The Board found that Mr. Bahr testified that the Property sits behind commercial property and that other properties are zoned for development.
47. The Board found that Mr. Fifer stated that the facility will not substantially affect adversely the uses of neighboring and adjacent properties.
48. The Board found that Mr. Fifer stated that the facility will be buffered by trees and elevation changes.
49. The Board found that Mr. Fifer stated that the City of Lewes supports the Application

and that the facility will benefit the neighboring community.

50. 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 special use exception because the facility will not substantially affect adversely the uses of neighboring and adjacent properties. The findings below further support the Board's decision to approve the Application.
- a. The Applicant proposes to operate a skilled care nursing residential facility known as Tranquility at Breakwater on property consisting of 6.95 acres more or less.
 - b. The site is zoned AR-1 (Agricultural Residential) under the Sussex County Zoning Code and convalescent homes, nursing homes, or homes for the aged are authorized as a special use exception in the AR-1 Zoning District.
 - c. The proposed facility will contain 104 rooms for residents.
 - d. The Property is located on a landlocked parcel near Old Orchard Road. The facility will be accessed from an existing easement on Oyster Cove Drive.
 - e. The site where the facility will be located is in an investment level 2 area under the Delaware Strategies for State Policies and Spending, which is an area where the state supports the development of a broad mix of housing options. The portion of the site where the pond will remain is in an investment level 3 zone.
 - f. The facility will be served by central water for domestic use and fire protection by Tidewater Utilities, a regulated public utility company. The facility will be provided sewer from the City of Lewes and adequate capacity is available. As part of the development, three existing septic tanks will be abandoned.
 - g. The site is located in an area containing a mixture of uses including medical and professional offices, retail and commercial centers, and multi-family and single family residential developments.
 - h. The community will contribute to serving the needs of older county residents for this type of residential alternative.
 - i. Aesthetics:
 - i. Opposition expressed concern about the aesthetics of the facility; specifically the height of the facility. The facility, however, will only be three stories tall and will be limited in height by the Sussex County Zoning Code. Furthermore, the site elevation of the facility is several feet lower than the elevation of neighboring properties. As a result, the facility will likely not appear to be as tall as it actually is. The difference in elevation is clear from the site plan submitted by the Applicant.
 - ii. The perimeter of the development will also be landscaped to provide screening of the site.
 - iii. The rear of the Property includes an existing pond formerly used as a borrow pit. The Applicant intends to retain the pond and will make improvements to the pond. The rear of the site will be largely undisturbed and should retain much of its current scenic character.
 - iv. To the extent the facility will have an aesthetic impact on neighboring properties, the Board finds that the impact is minimal at best.
 - v. As such, there should be no substantial adverse effect on the adjacent and neighboring properties from the aesthetics or physical impact of the facility.
 - j. Traffic:
 - i. Old Orchard Road is located west of the site and Savannah Road is located nearby as well. The facility will be accessed from Oyster Cove Drive to Old Orchard Road.
 - ii. Entrance and roadway improvements required by DelDOT for the facility, if any, will be the responsibility of the Applicant and will address any traffic impact.
 - iii. DelDOT has jurisdiction over the traffic impact of the facility and the Applicant will have to comply with DelDOT regulations as part of the

site plan approval process. To the extent that the additional traffic along Old Orchard Road has an impact on the neighborhood, compliance with DelDOT regulations should minimize that impact. The Board also notes that DelDOT is considering traffic improvements in the area which should alleviate congestion.

- iv. The facility will also provide shuttle services for its residents and this service should help to reduce the amount of traffic from the facility.
- v. Due to the nature of the facility, it is anticipated that most residents will not have vehicles.
- vi. Ultimately, it is not convincing that the facility will have a substantial adverse effect on traffic in the area.

k. Parking:

- i. The Applicant is proposing to have 91 parking spaces available for the facility. This proposal should provide ample parking for the facility. No evidence was presented by the opposition that the parking associated with the facility would create a substantial adverse impact on neighboring and adjacent properties.

l. Lighting:

- i. All lighting associated with the facility will be directed at a downward angle to minimize the light pollution on adjacent properties. The perimeter of the development will also be landscaped which should lessen the impact of any lighting from the facility.

m. Noise:

- i. There was no evidence that noise from the facility would rise to the level of a substantial adverse effect on neighboring and adjacent properties. The Applicant's proposed use will not involve loud machinery or extensive outdoor activity. Rather, the Applicant seeks permission to build a facility for residents to live in and interact. To the extent noise is generated by the facility, the landscape buffer surrounding the community should help to insulate noise generated by the facility from those neighbors outside the development.

n. Emissions:

- i. There was no evidence that there would be additional pollutants or negative environmental emissions from the proposed facility.

o. Stormwater Runoff:

- i. No evidence was presented that stormwater runoff from the facility will substantially affect adversely the uses of neighboring and adjacent properties.
- ii. As part of the development process, the Applicant will be required to meet storm water management system regulations set forth by the Sussex Conservation District and DNREC through a combination of Best Management Practices (BMP) and Best Available Technologies (BAT). The project may consist of some infiltration practices as well as traditional wet detention ponds. This storm water management system should limit the impact of the facility on neighboring properties and waterways.
- iii. The Board is convinced that compliance with the storm water regulations should minimize the impact of the facility on nearby streams and waterways.

p. The Neighborhood:

- i. The site is located in an area with several residential developments nearby with most of the residential development being located to the north, south, and west of the site. Only one of those developments is on lands contiguous to the site.
- ii. The area also includes professional and medical offices and retail and commercial centers. The Villages at Five Points, which includes residences and businesses is located near the site. There are numerous businesses located along Old Orchard Road and Savannah Road nearby; all of which are a short distance from the facility.

- iii. As noted by the opposition, a large hotel is proposed to be located near a bank and pharmacy in the area.
- iv. It is clear from reviewing the record that the area is a mixed use area. The Board was not convinced that the use of the Property for such a facility somehow substantially adversely affects the uses of neighboring and adjacent properties.

q. Property Values:

- i. There was no evidence, particularly expert testimony, reports, or studies, presented by the opposition that the facility would have a substantial adverse effect on property values in the neighborhood.
- r. Based on the record, the Applicant has demonstrated that the proposed use set forth in the application will not substantially affect adversely the uses of neighboring and adjacent properties.
- s. The Board also addresses the issue of advertising raised by the opposition. The opposition argued that the Board should have advertised the notice of the hearing by posting notice of the hearing along Old Orchard Road rather than posting the location of the actual site, which is a landlocked parcel. In Sea Pines Village Condominium Ass'n of Owners v. Sussex County Board of Adjustment, (Del. Super. Oct. 28, 2010), the Delaware Superior Court examined a similar issue where notice of a hearing was incorrectly posted on a neighboring property. In its decision, the Court held that if the Board elects to post notice of the hearing, it must do so properly and post the property which is the subject of the hearing. Posting on lands adjacent to Old Orchard Road, as proposed by the opposition, would run contrary to the Sea Pines Village decision and would lead to defective notice. The Board was not convinced that notice was inadequate. Rather, the presence of opposition evidences that notice of the hearing was effective.

The Board granted the special use exception application finding that it met the standards for granting a special use exception.

Decision of the Board

Upon motion duly made and seconded, the special use exception 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 special use exception 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 February 5, 2019.