

**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, and a written decision was rendered by the Board on February 5, 2019. A Motion for Rehearing was submitted on February 11, 2019. The Board discussed the Motion at its meeting on April 1, 2019. The Board members present were: Mr. Dale Callaway, Ms. Ellen Magee, Mr. John Mills, and Mr. Brent Workman.

Nature of the Proceedings

This is a motion for a rehearing of Case No. 12225 pursuant to Board of Adjustment Rule 18.

Findings of Fact

The Board found that the Applicant in Case No. 12225 requested 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. On February 4, 2019, the Board issued a decision regarding Case No. 12225 – Old Orchard Ventures, LLC – which granted the Applicant a special use exception for a convalescent home, nursing home, and / or home for the aged.
2. On February 11, 2019, the Board received a Motion for Rehearing pursuant to Board Rule 18. The Motion was filed by Janice Allmaras, Joseph Rolla, and Robert Viscount (collectively “the Movants”). On February 20, 2019, the Board received a written response from Old Orchard Ventures, LLC, through its attorney Larry Fifer, Esquire. Both submissions were timely filed.
3. Pursuant to Board Rule 18.2, the Board “shall determine the motion upon written application, any responses thereto, and accompanying affidavits, if any.” Accordingly, no oral argument was presented to the Board and the motion was determined based on the written record.
4. In their Motion, Movants have alleged that Case No. 12225 – Old Orchard Ventures, LLC, should be reheard due should be reheard due to newly discovered evidence which by due diligence could not have been discovered at the time of the original hearing.
5. Pursuant to Board Rule 18.1, The Board of Adjustment may rehear a matter for the following reasons: a) Mistake, inadvertent surprise or excusable neglect; b) Newly discovered evidence which by due diligence could not have been discovered at the time of the original hearing, or c) Fraud, misrepresentation or other misconduct of an adverse party. The Movants do not argue that Board Rule 18.1(a) and (c) apply so any arguments under Board Rule 18.1(a) and (c) are deemed waived.
6. After review of the written motion and response, the Board denied the Motion for Rehearing for the following reasons.
7. In this case, Movants alleged that they did not have sufficient time to review the Applicant’s written submissions to the Board prior to the hearing held on November 5, 2018, and that, had they been afforded additional time to review those materials, they would have submitted additional evidence into the record. No such evidence, however, was specifically identified in the Motion.

8. Movants also assert that the Applicant failed to file its submissions in a timely manner. This is not true. The Applicant actually submitted exhibits to the Board prior to the hearing on November 2, 2018, and those exhibits were available to the public for inspection. Movants even acknowledge that the Applicant's exhibits were submitted prior to the hearing date. Even assuming *arguendo* that the Applicant did not submit its exhibits until the hearing, Board rules do not require submissions of exhibits prior to the hearing. Rather, the Board often receives exhibits from supporters and opposition at its public hearings. It is thus clear that the Applicant's exhibits were timely filed.
9. While the Movants argue that their request for a rehearing is not an attempt to rehash or reargue various points from the original hearing, the issue of whether to leave the record open for additional comment was raised before the Board at the initial hearing when Mr. Viscount requested that the record be left open. The Board specifically considered that request and ultimately voted to table the Application and close the public record. The Board is not required to leave the record open after a hearing. Moreover, Delaware law is clear that a motion for rehearing is not a vehicle to rehash or more forcefully present arguments already made. Disagreement with the Board's conclusions (including the decision to close the public record after the public hearing) does not rise to the level of warranting a rehearing. The Board will deny a motion for reargument that does no more than restate a party's prior arguments.
10. Delaware law is also clear that rehearings on grounds of newly discovered evidence are disfavored and movants must establish five elements in order to obtain a new hearing on these grounds. Movants have the burden of proving that 1) this evidence came to their knowledge since the hearing, 2) the knowledge could not have been used at the hearing, 3) it is so material and relevant that it would probably change the result if a new hearing was granted, 4) it is not merely cumulative or impeaching in character, and 5) it is reasonably possible that evidence will be produced at the hearing. Movants have not met this burden. The Movants have not cited any specific evidence that is "newly discovered" and failure to do so is fatal to the motion. Without even a reference as to what evidence the Movants believe is "newly discovered", the Movants have failed to adequately provide a basis for the Board to review these five standards. The Board is not convinced that the Movants have met any of the 5 standards. Accordingly, the Board was not convinced that the Movants have satisfied the conditions for granting a rehearing. As such, the Motion for Rehearing was denied.

The Board denied the Motion for Rehearing for the reasons as set forth above.

Decision of the Board

Upon motion duly made and seconded, the Motion for Rehearing was denied. The Board Members voting to deny the Motion for Rehearing were Mr. Dale Callaway, Ms. Ellen Magee, Mr. John Mills, and Mr. Brent Workman. No Member voted against the Motion to Deny the Motion for Rehearing. Mr. John Williamson did not participate in the hearing, discussion, or vote of this matter.

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 June 4, 2019.