

BEFORE THE BOARD OF ADJUSTMENT OF SUSSEX COUNTY

IN RE: JASON HARSHBARGER & STACY HARSHBARGER

(Case No. 12239)

A hearing was held after due notice on December 10, 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 build a dwelling (stick built / modular) in a non-conforming mobile home park.

Findings of Fact

The Board found that the Applicants are requesting a special use exception to build a stick built / modular home in a non-conforming manufactured home park. This application pertains to certain real property located on the south side of S. Shore Drive Ext., approximately 350 feet southwest 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 and 1-34-2.00-4.00. After a hearing, the Board made the following findings of fact:

1. The Board was given copies of the Application, a site plan dated September 5, 2017, a letter from Tim Willard, Esquire, a copy of the Superior Court decision in Harshbarger v. Sussex County Board of Adjustment, Case No. S17A-12-002 ESB, a memorandum from Planning & Zoning Director Janelle Cornwell with records from prior special use exception applications in this manufactured home park, an aerial photograph of the Property, a portion of the tax map of the area, and a copy of the sewer easement survey along with a letter from Lawrence Lank for the record.
2. The Board found that the Office of Planning and Zoning received eleven (11) letters in support of and four (4) letters in opposition to the Application.
3. This Application pertains to Lot 69 in the Simpson's Mobile Home Park, which has also been historically referred to as the Rock Turn Mobile Home Park ("the Park"). The Board previously heard an appeal of a decision of the Planning & Zoning Director Janelle Cornwell regarding the Property. Ms. Cornwell refused to allow the Applicants to apply for this special use exception because she found no section of the Sussex County Zoning Code which allowed for this use. The Board upheld Ms. Cornwell's decision but the decision was later affirmed in part and reversed in part by the Superior Court in Harshbarger v. Sussex County Board of Adjustment, Case No. S17A-12-002 ESB. The Applicants subsequently filed this Application.
4. The Board found that Jason Harshbarger and Stacy Harshbarger were sworn in to testify about the Application. Timothy Willard, Esquire, presented the Application on behalf of the Applicants and he submitted exhibits, including letters of support and proposed findings of fact, to the Board to review. The Board also heard statements from Ms. Cornwell about this Application.
5. The Board found that Mr. Willard stated that the Applicants live in Pennsylvania and purchased a property in the Park. The Park is zoned MR and is a non-conforming mobile home park. The Applicants later sought a building permit for a modular home and were denied. The Applicants believe though there is a legal basis to allow for the proposed home.
6. The Board found that Mr. Willard stated that the Property was previously improved with a manufactured home on pilings. The home was dilapidated and the

Applicants removed the manufactured home. The home had been vacant for several years at that time.

7. The Board found that Mr. Willard stated that the Applicants propose to improve the lot with a two-story modular home. The dwelling will be built to Sussex County Building Code standards and not HUD standards and the dwelling will be more hurricane resistant. The dwelling will be on pilings since the Property is in a flood plain. The house will also be designed to provide more off-street parking.
8. The Board found that Mr. Willard stated that the dwelling will be placed in a location to ensure that there is at least 20 feet from all buildings in the Park. He noted that the separation distance requirement protects the integrity of the Park and is analogous to setback requirements in a subdivision. As such, the proposed dwelling will be at least 20 feet from any neighboring dwelling. The dwelling will also meet the MR setback requirements.
9. The Board found that Mr. Willard stated that the Park has evolved and that the lots are held under 99 year leases. The Applicants' lease is recorded. He argued that there is case law which holds that lots held in renewable 99 year leases are actually held in fee simple and that, consequently, these leases cannot legally change. According to Mr. Willard, the nature of the leases also make it impossible to subdivide the Park unless someone purchased all the lots. He also stated that a plot for the Park was recorded in 2005.
10. The Board found that Mr. Willard stated that MR zoning allows only for single-family homes. He argued that the proposed use is in keeping with the permitted uses in an MR zoning district. There are 4 other lots in the Park which are allowed to be used for modular or stick-built homes.
11. The Board found that Mr. Willard stated that the Court found that the Board failed to investigate the 4 prior applications and that the Board should have allowed the Applicants to file for a special use exception. Mr. Willard argued that the Board should have considered its precedent and that the fear about the impact of this decision on other MR mobile home parks is overblown.
12. The Board found that Mr. Willard stated that he searched for cases related to §115-210(A)(3)(i) and that most cases which came up under §115-210(A)(3)(i) were related to the Park. The prior applications were accepted and the Board considered and approved the applications under §115-210(A)(3)(i). The former Planning & Zoning Director Lawrence Lank did not deny those applications and there were no appeals. Mr. Willard stated that, based on his experience, it was not unusual for applicants to confer with Mr. Lank prior to filing for zoning approval and it is likely that Mr. Lank guided prior applicants to this relief. Mr. Willard argued that §115-210(A)(3)(i) is a "catch-all" provision and that a stick-built home in a non-conforming manufactured home park in a MR zoning district falls under §115-210(A)(3)(i). He noted that the Golding case in 2012 was approved under §115-210(A)(3)(i) for a stick-built home on a lot adjacent to the Applicants' lot and that the Board has previously held that stick-built homes in the Park do not substantially affect adversely the uses of neighboring and adjacent properties.
13. The Board found that Mr. Willard stated that the Applicants were concerned that they would not be able to replace a manufactured home because a non-conforming use is deemed abandoned if it is not used within 2 years. Ms. Cornwell disagreed and stated that a manufactured home in a manufactured home park can be replaced with a manufactured home.
14. The Board found that Mr. Willard stated that, in Cheswold Aggregates v. Town of Cheswold, the Town proffered 2 interpretations of a statute and the Court held that the Town erred as a matter of law. He argued that the Cheswold case points to well-held common law, that in cases of doubt, interpretations must be construed to favor the landowner.

15. The Board found that Mr. Willard stated that the proposed home will not substantially affect adversely the uses of neighboring and adjacent properties.
16. The Board found that Mr. Willard stated that the house will improve property values.
17. The Board found that Mr. Willard stated that there are condominiums on neighboring properties and that neighbors in South Shore Marina allege that the house will block views but the law does not protect views. Rather, according to Mr. Willard, the immediate neighbors support the Application and that letters of support have been submitted into the record.
18. The Board found that Mr. Harshbarger affirmed the statements made by Mr. Willard as true and correct.
19. The Board found that Mr. Harshbarger testified as to the homes on neighboring properties and the pictures submitted to the Board. One neighboring lot was recently improved with a manufactured home on pilings.
20. The Board found that Mr. Harshbarger testified that the Applicants plan to construct a two-story home which will be more hurricane resistant. The footprint of the house will be 28 feet by 42 feet. The Applicants also want room for more off-street parking and, by building the home vertically, additional room for parking will be available. The Applicants do not intend to exceed the Sussex County height requirement.
21. The Board found that Mr. Harshbarger testified that a prior Board member previously asked whether a similar application could go forward and the question was forwarded to Planning & Zoning staff and the application was approved.
22. The Board found that Mr. Harshbarger testified that there are 20 lots in the Park and 18 homes; of which 4 are stick-built homes.
23. The Board found that David DeCristo and Steven Golding were sworn in to give testimony in support of the Application.
24. The Board found that Mr. DeCristo testified that he owns a two-story home in the Park and he received a special use exception for the home. He believes that the proposed dwelling will improve property values and off-street parking.
25. The Board found that Mr. DeCristo testified that the inlet is nearby and it is important to build a hurricane-resistant structure. Mr. DeCristo, who works in construction, used concrete pilings and built his home to protect against hurricanes. He also noted that the Park is located in a VE-9, rapid flood area where mobile homes would not comply with codes.
26. The Board found that Mr. Golding testified that he lives next door to the lot and his home is a modular home previously approved by the Board. His immediate neighbors and the Park's Board support the Application.
27. The Board found that Mr. Golding testified that the VE-9 classification places great limits on development in the Park - particularly with financing – and that the Park suffers from high water and winds.
28. The Board found that Mr. Golding testified that this is not a typical mobile home park and that he wants the best quality homes in the neighborhood.
29. The Board found that Phil Boling and Terence Lynam were sworn in to give testimony in opposition to the Application and submitted exhibits to the Board to review. Mr. Boling was also testifying on behalf of his condominium association.
30. The Board found that Mr. Boling testified that he owns a townhouse in the South Shore Marina Condominium. He purchased his unit in 2016. He testified that his deck offers an unimpeded view of the water and that he was told by his real estate agent that the views would remain unimpeded because the neighboring property was zoned as a mobile home park. He noted that the views are important to him.
31. The Board found that Mr. Boling testified that market values at the beach are highly affected by views and multi-story homes will affect the views of his unit. He believes that the blocking of views will devalue neighboring property value and that

the proposed home will also adversely affect rental income associated with his townhouse.

32. The Board found that Mr. Lynam testified that he owns a single-family house in the development. He previously owned a townhouse nearby as well and he sold the townhouse at a significant loss. He believes that the development of the Park contributed to the devaluation of his townhouse.
33. The Board found that Mr. Lynam testified that he was under the impression that the Park was a mobile home park but other homes have been approved in the Park. The first home approved in 2005 was on a much larger lot, the home approved in 2011 was a one-story home, the home approved in 2012 was a one-story home, and that the home approved in 2014 was a two-story home. He believes that the home approved in 2014 substantially changed the neighborhood.
34. The Board found that Mr. Lynam testified that other owners in the Park are awaiting the Board's decision and will then seek a similar approval. He believes that the use of the Park will change and this will change the character of the neighborhood.
35. The Board found that Mr. Lynam testified that he believes market value is based on the ability to see the water and that blocking of views of the water will affect property values.
36. The Board found that six (6) people appeared in support of the Application and that three (3) people appeared in opposition to the Application.
37. The Board tabled its discussion on this case until January 7, 2019, at which time the Board discussed and voted on the Application. This decision reflects the final decision of the Board pursuant to Board Rule of Procedure 14.8 which provides that "any oral discussion of or vote upon the application by the Board shall be deemed in the nature of preliminary deliberations to the rendering of a final written decision and only the written decision, as adopted by a majority of the Board, shall constitute a decision of the Board."
38. 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 manufactured home-type structure 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. First, the Board considered whether the Application could be heard under §115-210(A)(3)(i) which provides that an applicant may seek a special use exception for "a determination, in cases of uncertainty, of the district classification of any use not specifically named in these regulations; provided, however, that such use shall be in keeping with the uses specifically permitted in the districts in which such use is to be classified." The Applicants sought this special use exception under §115-210(A)(3)(i), which is the same section of Code used in four other previous cases in the Park where other applicants sought similar relief. Based on a strict reading of §115-210(A)(3)(i), however, relief would not seem to be available for the Applicants. That being said, the Board cannot ignore the previous cases in the Park and the precedent set by applying §115-210(A)(3)(i) to those cases. Those cases, which were forwarded to the Board by the prior Planning & Zoning Director, were approved by the Board and stick-built / modular homes were thereafter constructed. Based on the evidence submitted in the record, it seems reasonable to assume that the prior Director accepted applications under §115-210(A)(3)(i) because the Park is unique and the remedies within the Code are limited. The Park's lots are held in automatically renewable 99-year leases and the Park is a non-conforming manufactured home park on lands zoned MR (Medium Residential) where manufactured home parks are not allowed. Subdivision

of the Park, while technically possible, is highly unlikely due to the separate ownership of the leasehold interests within the Park. The nature of the leases creates a situation more akin to a standard subdivision with separately owned lots than a manufactured home park where lots are leased and land rent is paid. The Delaware Code even distinguishes such leases where a permanent leasehold interest exists.¹ Consequently, the Park is left with existing lots of certain sizes which cannot be easily changed. The Park also has unique physical characteristics which further complicate matters. Specifically, the Park is located in a flood plain and homes therein, including the Applicant's lot, must be placed on pilings. While manufactured homes are located in the Park on pilings, testimony also indicates that at least part of the Park is within the VE-9 classification and has heightened flood zone requirements. These heightened requirements call into question the feasibility developing these lots with manufactured homes. Furthermore, the Board notes that the research presented in this case indicates that §115-210(A)(3)(i) has not been used to afford similar relief in other non-conforming manufactured home parks. As such, based on the unique circumstances on the Park and the precedent set within the Park, the Board does not see where the relief afforded to lots within the Park can be used in other non-conforming manufactured home parks. Lastly, the Board refers to the Superior Court decision in Harshbarger v. Sussex County Board of Adjustment whereby the Court directed the Board to permit the Applicants to file a special use exception. Accordingly, the merits of the special use exception application are discussed below.

- b. The proposed modular home will be located on a lot previously used for a manufactured home on pilings. The footprint of the dwelling is reasonable and the home will only be two stories tall on pilings. The site plan demonstrates that the home will meet all setback requirements for a home in a manufactured home park and will also meet the MR setback requirements. By meeting these requirements and by elevating the home, the Applicants will meet or exceed flood plain requirements and will provide for off-street parking, which is needed in the neighborhood.
- c. The nature of a stick-built / modular home is consistent with residential uses and does not generate noise, light, smells, or other nuisances associated with commercial or business uses which neighboring properties might find objectionable. No evidence to the contrary was submitted by the opposition.
- d. There was no evidence that there would be additional pollutants or negative environmental emissions from the proposed stick-built / modular home.
- e. Many neighbors in the area – including an immediate neighbor - have submitted letters and testimony supporting the Application.
- f. There was also no evidence submitted into the record which demonstrated that the proposed stick-built / modular home would have a substantial adverse effect on traffic in the neighborhood. Rather, the record is clear that the Applicants intend to use the home as a second residence. Traffic

¹See 25 Del. C. § 304. (“Permanent leasehold estates, renewable forever, shall be considered to be estates in fee simple, and shall be subject to the same modes of alienation, power of devise, and rules of descent and distribution, and to all the incidents of an estate in fee, provided that the grantor of the leasehold or the person entitled to the estate, out of which the term issues, has first released to the grantee of the term or the person in possession of the leasehold all his right to the rent charged upon or growing out of the leasehold.”)

related to the home would likely, thus, be no different than if the site was used for a manufactured home.

- g. As noted above, the site has room to provide off-street parking. No evidence was presented by the opposition that the parking associated with the stick-built / modular home would create a substantial adverse impact on neighboring and adjacent properties.
- h. The opposition complained about the aesthetic effect of the stick-built / modular home; specifically the impact of the proposed dwelling on their views. While this concern appeared to be the focus of the opposition's argument against the Application, the Board is not convinced that the stick-built / modular home will rise to the level of creating a substantial adverse impact on the uses of neighboring and adjacent properties. The dwelling will not exceed the County's height limitation and, after review of the opposition's photographs, the Board is not convinced that a home built in compliance with the County's height requirements will block views to such an extent that neighboring properties would suffer a substantial adverse effect. Rather, photographs indicate that at least some of the structures on South Shore Marina, where some members of the opposition reside, are generally taller than one-story. There is also a significant distance between the units in South Shore Marina and the Property as evidenced by photographs of a marina which separates the two properties. As such, the visual impact of a two-story home on pilings is less for units in South Shore Marina than if the properties were immediately adjacent to each other. Moreover, the Board notes that, as held in Brett v. City of Rehoboth, 1986 WL 7533 (Del. Ch. 1986), "appropriate analysis commences with recognition of the general rule that a landowner has no implied easement or other right with respect to his neighbors' land that may be used to prevent his neighbor from building on his property - if permitted to do so by applicable zoning regulations - in a way that interferes with a desirable view. 'Generally no action can be maintained by one property owner against another for cutting off his view unless statute confers such right.'"
- i. There was no expert testimony, reports, or studies presented by the opposition that the stick-built / modular home would have a substantial adverse effect on property values in the neighborhood. Rather, the opposition made speculative statements about the effect of the stick-built / modular home on their views and the possible impact on property values. One neighbor suggested that he lost money on the sale of a nearby property due to the development of the Park but he provided no documentation to support his claim nor did he convince the Board that the development of the Property with a stick-built / modular home rather than a manufactured home would substantially affect adversely the property values of neighboring properties. The Board also heard views to the contrary from a neighbor that he believed the proposed home would improve property values in the neighborhood. The Board was not convinced that the proposed dwelling would have a substantial adverse effect on neighboring and adjacent properties.
- j. The Board was not convinced that the structure will have a substantial adverse effect on neighboring and adjacent properties.

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 March 5, 2009.