

BEFORE THE BOARD OF ADJUSTMENT OF SUSSEX COUNTY

IN RE: JAMES O. MARSHALL, III

(Case No. 12345)

A hearing was held after due notice on August 19, 2019. The Board members present were: Dr. Kevin Carson, Mr. Jeff Chorman, Ms. Ellen Magee, and Mr. John Williamson.

Nature of the Proceedings

This is an application for a variance from the maximum height requirement for a proposed fence.

Findings of Fact

The Board found that the Applicant is requesting a variance of 0.5 feet from the maximum fence height requirement of 3.5 feet for 313.51 feet of proposed fencing within the front yard setback area. This application pertains to certain real property located on the north end of Green Road approximately 0.26 miles north of Lawton Lane (911 Address: 33557 Green Road, Millsboro) said property being identified as Sussex County Tax Map Parcel Number: 2-34-18.00-54.00. After a hearing, the Board made the following findings of fact:

1. The Board was given copies of the Application, a building permit application, a fence proposal, a survey of the Property dated February 15, 2018, a letter from Heidi Gilmore, Esquire, pictures, aerial photographs of the Property, and a portion of the tax map of the area.
2. The Board found that the Office of Planning & Zoning received one letter in support of and no correspondence in opposition to the Application.
3. The Board found that James Marshall, Irene Haas, and Robert Haas were sworn in to testify about the Application.
4. The Board found that Mr. Marshall testified that he plans to erect a fence measuring 4 feet tall around his property to keep his two dogs in the yard.
5. The Board found that Mr. Marshall testified that his dogs jumped over a 3.5 foot tall fence at his prior home and he needs a slightly taller fence to keep them on the lot.
6. The Board found that Mr. Marshall testified that the front yard is next to a cornfield and there is an active deer population. He believes the fence will assist in keeping wildlife off the Property as well.
7. The Board found that Mr. Marshall testified that the Property is unique because it has an unusual shape with only three sides.
8. The Board found that Mr. Marshall testified that the Property is located at the end of a dirt road. There are no other houses in front of this property.
9. The Board found that Mr. Marshall testified that the Property cannot otherwise be developed for at 4 foot tall fence to keep wildlife out without the variance.
10. The Board found that Mr. Marshall testified that the exceptional practical difficulty was not created by the Applicant as he did not create the uniqueness of the lot.
11. The Board found that Mr. Marshall testified that the variance will not alter the essential character of the neighborhood and that the neighbors submitted a letter of support.
12. The Board found that Mr. Marshall testified that the fence could be built to 7 feet tall on the other two sides but he wants to keep it all uniform at 4 feet tall.
13. The Board found that Mr. Marshall testified that the fence has not yet been installed.
14. The Board found that Mr. Marshall testified that if the lot was traditionally shaped, he would have been able to place the fence in the rear yard and not the front yard.

15. The Board found that Ms. Haas testified that this property is at the end of a long gravel driveway used only by the Marshall household and the fence will not impede traffic visibility.
16. The Board found that Mr. Haas testified that arborvitaes are not an option (rather than a fence) as arborvitaes are a non-native species and require a lot of maintenance. He also noted that the property is close to the water.
17. The Board found that no one appeared in support of or in opposition to the Application.
18. Based on the findings above and the testimony and evidence presented at the public hearing and the public record, which the Board found credible, persuasive, and un rebutted, 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 as it is a triangularly shaped lot bordering Herring Creek. Due to these unique conditions, the lot does not have a traditional front, side, and rear yard. The lot is also located in a flood zone, as is shown on the survey, thereby limiting development of part of the lot. The Applicant has dogs and wishes to keep them fenced in his yard but the dogs can clear a fence that measures only 3.5 feet tall. The Applicant, thus, needs to construct a slightly taller fence. Normally, an applicant could construct a fence in the rear yard which would be allowed to exceed 3.5 feet but, in this case, the rear yard is unusually shaped and is part of the flood zone. As such, the front yard is the appropriate location for the dogs to roam. It is clear that the unique physical characteristics of the Property have created the unnecessary hardship and exceptional practical difficulty for the Applicant who seeks to construct a reasonably sized fence.
 - b. The unnecessary hardship and exceptional practical difficulty are not being created by the provisions of the Sussex County Zoning Code.
 - c. Due to the uniqueness of the lot, the Property cannot be developed in strict conformity with the Sussex County Zoning Code. The Property is bordered by Herring Creek and the Property is triangularly shaped. The Applicant seeks to construct a reasonably sized fence to provide a barrier for his dogs but is unable to do so without violating the Sussex County Zoning Code. The Board is convinced that the variance is necessary to enable the reasonable use of the Property as the variance will allow the Applicant to construct a reasonably sized fence on the Property. The Board is convinced that the shape and location of the fence are also reasonable, which is confirmed when reviewing the survey and exhibits provided by the Applicant. The Board also notes that a fence built in compliance with the Code would be short enough for the Applicant's dogs to clear and would be ineffective. A slightly taller fence is, thus, needed.
 - d. The unnecessary hardship and exceptional practical difficulty were not created by the Applicant. The Applicant did not create the unique shape of the lot or the lot's flood zone condition. The unique characteristics of the Property are clear when reviewing the exhibits submitted by the Applicant. The Board is convinced that the unnecessary hardship and exceptional practical difficulty was not created by the Applicant but was created the lot's unique characteristics.
 - e. The variance 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 fence will have no effect on the character of the neighborhood. The fence is reasonable in height and it will connect to other fencing of the same height on the lot. The fence should also provide a

safety mechanism to keep the Applicant's dogs in the yard and away from neighboring properties. Furthermore, no evidence was presented which would indicate that the variance would somehow alter the essential character of the neighborhood or be detrimental to the public welfare. Rather, the Board received a letter from the Applicant's neighbor supporting the Application. The Board also notes that no evidence was presented that the fence would produce visibility or traffic issues.

- f. The variance sought is the minimum variance necessary to afford relief and the variance requested represents the least modification possible of the regulation at issue. The Applicant has demonstrated that the variance sought will allow the Applicant to construct a reasonably sized fence on the Property which will keep his dogs on the Property. The fence is only slightly taller than allowed under the Code but is tall enough so that the Applicant's dogs cannot jump over the fence.
- g. The condition or situation of the Property and the intended use of the Property is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the Sussex County Zoning Code.

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 of the Motion to approve were Dr. Kevin Carson, Mr. Jeffrey Chorman, Ms. Ellen Magee, and Mr. John Williamson. No Board Member voted against the Motion to approve the variance application. Mr. Brent Workman did not participate in the discussion or vote on this application.

BOARD OF ADJUSTMENT
OF SUSSEX COUNTY



Ellen M. Magee
Chair

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

Date October 22, 2019