

BEFORE THE BOARD OF ADJUSTMENT OF SUSSEX COUNTY

IN RE: SHIRLEY A. PERRY

(Case No. 12357)

A hearing was held after due notice on September 9, 2019. The Board members present were: Ms. Ellen Magee, Mr. John Williamson, and Mr. Brent Workman.

Nature of the Proceedings

This is an application for variances from the front yard setback and side yard setback requirements for existing structures.

Findings of Fact

The Board found that the Applicant is requesting a variance of 25.2 feet from the forty (40) feet front yard setback requirement from Fisher Road for an existing pole building and a variance of 8.3 feet from the ten (10) feet side yard setback requirement on the east side for an existing shed. This application pertains to certain real property that is a through lot fronting on the north side of West Springside Drive and the south side of Fisher Road approximately 0.37 miles west of Martin Farm Road (911 Address: 28403 West Springside Drive, Milton) said property being identified as Sussex County Tax Map Parcel Number 3-34-10.00-91.00. After a hearing, the Board made the following findings of fact:

1. The Board was given copies of the Application, a survey of the Property dated July 19, 2019, a building permit application, 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 Shirley Perry and David Byler were sworn in to testify about the Application.
4. The Board found that Mr. Byler testified that he represents Delmarva Pole Building who the owner contracted to construct the pole building.
5. The Board found that Mr. Byler testified that the Applicant wanted additional storage space.
6. The Board found that Mr. Byler testified that the lot is small and is a through lot with two front setbacks. He claimed that the builder was unaware that there was no rear yard setback requirement for the Property.
7. The Board found that Mr. Byler testified that the building shell is complete and no further development is possible. He claimed that work stopped once Delmarva Pole Building was aware of the issue.
8. The Board found that Mr. Byler testified that the pole building was built too close to Fisher Road and that the permit said the pole building had to be 40 feet from Fisher Road.
9. The Board found that Mr. Byler testified that Delmarva Pole Buildings was issued a building permit and that a code official was present for the building placement. The code official advised them that the building was too close to the fence.
10. The Board found that Mr. Byler testified that the exceptional practical difficulty was not created by the Applicants as they were not aware that the Property was a through lot.
11. The Board found that Mr. Byler testified that moving the pole building will create a major expense and hardship for the property owner.
12. The Board found that Mr. Byler testified that the pole building will not affect visibility on the road and there are pole buildings in the area with similar setbacks.
13. The Board found that Mr. Byler testified that the variances requested are the minimum variances to keep the building in its current location.

14. The Board found that Mr. Byler testified that the detached shed was not built by Delmarva Pole Buildings.
15. The Board found that Ms. Perry testified that the lot is accessed from both sides of the lot.
16. The Board found that Ms. Perry testified that the lot is serviced by well and septic. The septic in on the northeast side of the Property and the well is on the side of the Property closest to West Springfield Drive.
17. The Board found that Jeff Shockley, Kelly Passwaters, Anderson Wright, Mike Costello, and Clay Willey were sworn in to give testimony about the Application.
18. The Board found that Planning & Zoning Director Janelle Cornwell provided background on the history of permitting. She stated that, on June 6, 2019, the building inspector noted that the pole building was too close to the side yard setback and the Applicants moved the building. On June 19, 2019, a complaint was lodged regarding the front yard setback and a zoning inspector went to the Property and verified that the building was in violation of the front yard setback on Fisher Road. A notice of violation was sent to the property owner. The Applicant was advised to stop work on June 25, 2019, and the notice of violation was posted on the Property. On July 2, 2019, the inspector noted that a shed was being constructed on the Property without a permit and a notice of violation for lack of permit was issued on July 3, 2019. A permit for the shed was applied for on July 25, 2019.
19. The Board found that Mr. Willey testified that he is the building inspector who checks the footings and that building inspectors are now beginning to check setbacks also.
20. The Board found that Mr. Willey testified that he noted the building would not meet side setbacks and he told the builder and the placement of the building was moved.
21. The Board found that Mr. Willey testified that there is a drainage field which limited where the pole building could be placed and he did not think the building could be turned without encroaching on the drain field.
22. The Board found that Mr. Willey testified that he thought Fisher Road was the access road for the Property.
23. The Board found that Ms. Passwaters testified that she inspected the Property following a complaint to the Planning and Zoning Office and she issued a violation for the garage not meeting the setback requirements. The violation was issued on June 20, 2019, and the notice was posted on the Property on June 25, 2019. At that time, the garage was already built but did not have doors installed.
24. The Board found that Ms. Passwaters testified that she returned to the Property on July 2, 2019, to check the status of the garage and she noticed there was a unpermitted shed on the Property. The shed also did not meet the required 5 foot side yard setback requirement.
25. The Board found that Ms. Passwaters testified that she spoke with Ms. Perry's grandson and she explained that a permit could not be obtained because of the violation on the Property. She explained that an application should be submitted for a variance for the shed and the garage.
26. The Board found that Ms. Passwaters testified that she had a discussion with representatives from Delmarva Pole Buildings and the representative stated they were not responsible as the property owner signed a waiver about the placement of the pole building.
27. The Board found that Ms. Passwaters testified that, when she visited the site again, she spoke with Ms. Perry who stated that Delmarva Pole Buildings are responsible for the placement of the pole building. Ms. Passwaters felt that neither party accepted responsibility for the violation.
28. The Board found that Ms. Passwaters testified that the dwelling received a certificate of compliance in 2005 but does not meet the setback requirements. The Board notes that the only issues before the Board are the shed and the pole building. The dwelling encroachment can be handled administratively.

29. The Board found that Ms. Passwaters testified that the pole building could not meet the setback requirements unless it was right up against the house.
30. The Board found that Ms. Passwaters testified that Delmarva Pole Buildings was aware of the setback requirement from Fisher Road.
31. The Board found that Mr. Costello testified that when the plans for this building were originally submitted there were some issues with the plans and the County requested a new site plan as the structure was on the wrong side of the house. He noted that the permit technician went over the setbacks with the builder and had the representative initial the permit showing they were aware of the 40 foot setback from Fisher Road.
32. The Board found that Ms. Perry testified that the shed can be moved.
33. The Board found that Andrew Long, Jr., was sworn in to give testimony about the Application.
34. The Board found that Mr. Long testified that he is the grandson of Ms. Perry and he lives at this property. Ms. Perry purchased the Property approximately one year ago and lives next door.
35. The Board found that Mr. Long testified that he put the shed on the Property but he was unaware that he needed a permit for an unattached shed. He thought no permit was needed for a portable shed.
36. The Board found that Mr. Long testified that, if Delmarva Pole Buildings placed the building where he requested, he would have requested a small variance because it would have been closer to the house. When he came home, however, he discovered that Delmarva Pole Buildings placed the pole building in the wrong spot because they measured from the middle of the road and not the property line.
37. The Board found that Mr. Long testified that he and his grandmother hired Delmarva Pole Buildings to construct this building and he relied on them to follow the County Zoning setbacks.
38. The Board found that Mr. Long testified that there is a similar sized pole building along Fisher Road.
39. The Board found that Mr. Long testified that the mailbox is from Fisher Road and that there is some distance from the property line to the edge of paving of Fisher Road.
40. The Board found that Mr. Costello testified that the County is currently cross-training the building code inspectors to check for setbacks on the preliminary footing inspection to identify errors prior to building and that the permit technicians are taking time to explain to applicants when special circumstances exist and to have the applicants sign or initial the permit to show that it is understood that special circumstances exist. The County is working on training all staff who deal with inspections or permits on identifying and following up on special circumstances before these errors occur. The County, however, expects builders to follow the parameters.
41. The Board found that Mr. Byler testified that Delmarva Pole buildings is responsible for the error and that the representative who signed for the permit did not relay the setbacks to the construction team. He is the project manager but never saw the permit.
42. The Board found that Mr. Byler testified that he was told that it was a 25 foot setback and he was unaware that there are two front yard setbacks.
43. The Board found that one person appeared in support of and no parties appeared in opposition to the Application.
44. The Board tabled the discussion of this application until its meeting on October 7, 2019. Board Member Kevin Carson reviewed the record and the audio of the hearing prior to the discussion and vote.
45. 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 for the variance for the pole building met

the standards for granting a variance. The findings below further support the Board's decision to approve the Application for the variance for that structure.

- a. The Property is unique due to its shape, size, and historical use. The Property is a through lot with road frontage on two roads and is narrow; particularly on the West Springfield Drive side of the Property. These conditions have created an exceptionally small building envelope. The building envelope is further limited since the Property is improved with a septic system and the drain field greatly limits the areas where structures can be located. These unique characteristics of this Property have created a limited building envelope and have created an unnecessary hardship and exceptional practical difficulty for the Applicant who seeks to retain an existing pole building on the lot.
- 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 has unique physical characteristics and the buildable area thereof is limited due to those characteristics. The Applicant seeks to retain an existing pole building on the lot 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 this reasonably sized pole building to remain on the lot. The Board is convinced that the shape and location of this pole building are also reasonable, which is confirmed when reviewing the survey provided by the Applicant.
- d. The unnecessary hardship and exceptional practical difficulty were not created by the Applicant. The Applicant only recently acquired the Property and its odd shape and development were created by a prior owners. These conditions have resulted in a limited building envelope on the Property which is further limited by the septic system location. These conditions have created the unnecessary hardship and exceptional practical difficulty. Furthermore, the Applicant worked with a builder to place the pole building on the Property in compliance with the Code only to later discover the encroachment. It is clear to the Board that the builder erred to the Applicant's detriment.
- 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 pole building will have no effect on the character of the neighborhood. While the pole building encroaches into the setback area, there is a gap between the edge of pavement of Fisher Road and the front property line such that the encroachment is not as noticeable as it would if the edge of pavement matched the front property line. The Board notes that there were no complaints from neighbors noted in the record about the pole building and the testimony demonstrates that there are other similar pole buildings in the area. The un rebutted testimony also demonstrates that the pole building does not affect visibility along Fisher Road. No evidence was presented that the variance would somehow alter the essential character of the neighborhood. The lack of evidence is telling since, if the pole building had somehow altered the essential character of the neighborhood, the Board would expect some evidence thereof.
- 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 retain the existing pole building on the lot.

The Applicant was significantly constrained by the location of the existing dwelling and by the unusual conditions of the lot. The Board also notes that the septic system greatly constrains the possible locations of the pole building.

- 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.

46. 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 variance application for the shed failed to meet the standards for granting a variance. The findings below further support the Board's decision to deny the Application for the shed.

- a. The Applicant failed to prove that a reasonably sized shed could not be built in strict conformity with the Sussex County Zoning Code. The Applicant admitted that the shed can be moved into compliance with the Code. The shed is portable and not attached to the dwelling so there appears to be no hurdle which would restrict the Applicant's ability to easily move the shed into compliance. As such, the shed can be placed on the Property in strict conformity with the Code and that the variance for the shed is not necessary to enable reasonable use of the Property.
- b. The Board finds that the Applicant is creating her own exceptional practical difficulty by placing a shed which does not fit within the building envelope. The Applicant's decision to place the shed in this location is the reason for the need for a variance and has nothing to do with the size, shape, or condition of the Property. Rather, the evidence is clear that the shed can be moved into compliance with the Code. Furthermore, the Applicant's grandson noted that he placed the shed without a permit and did not think a permit was necessary. Clearly, Mr. Long misunderstood the Code. Nevertheless, the Board was not convinced that the variance request was the product of a *need*. Instead, the variance request appears to be the product of a *want* as the Applicant seeks to retain the shed for purposes of convenience, profit, and / or caprice. Since the Applicant can place the shed in compliance with the Sussex County Zoning Code, the need for the variance is something created by the Applicant's wants rather than an unusual physical condition relating to the Property. The Applicant has thus created her own exceptional practical difficulty.
- c. Since the variance for the shed is not necessary to enable the reasonable use of the Property, the Board also finds that the variance requested for the shed is not the minimum variance necessary to afford relief. Furthermore, the Board finds there is space to build a reasonably sized shed on the Property in compliance with the Sussex County Zoning Code.

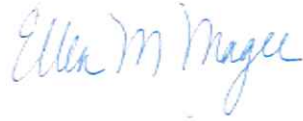
The Board approved the variance application for the pole building finding that it met the standards for granting a variance but denied the variance request for the shed finding that it did not meet the standards for granting a variance.

Decision of the Board

Upon motion duly made and seconded, the variance application was approved in part and denied in part. The Board Members in favor of the motion to approve the variance request for the pole building and to deny the variance request for the shed were Dr. Kevin Carson, Mr. John Williamson, and Mr. Brent Workman. Ms. Ellen Magee voted

against the Motion. Mr. Jeffrey Chorman 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 December 3, 2019