

BEFORE THE BOARD OF ADJUSTMENT OF SUSSEX COUNTY

IN RE: HAROLD WITMER

(Case No. 12358)

A hearing was held after due notice on September 9, 2019. The Board members present were: Mr. Jeffrey Chorman, 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, side yard setback, and rear yard setback requirements for existing structures.

Findings of Fact

The Board found that the Applicant is requesting the following variances: 1) a variance of 2.3 feet from the five (5) feet side yard setback requirement on the north side for an HVAC system; 2) a variance of 3.2 feet from the five (5) feet side yard setback requirement on the north side for steps; 3) a variance of 1.5 feet from the five (5) feet side yard setback requirement on the south side for a shed; and 4) a variance of 3.9 feet from the five (5) feet rear yard setback requirement for a shed. This application pertains to property that is located on the west side of West Lagoon Road approximately 114 feet north of South Dogwood Drive in the Dogwood Acres subdivision (911 Address: 30747 West Lagoon Road, Dagsboro); said property being identified as Sussex County Tax Map Parcel Number 1-34-6.00-58.00. After a public hearing, the Board made the following findings of fact:

1. The Board was given copies of the Application, a survey of the Property dated June 19, 2019, 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 Gil Fleming and Harold Witmer were sworn in to testify about the Application. Mr. Fleming submitted an exhibit to the Board.
4. The Board found that Mr. Fleming testified that he represents the builder and the builder made an error.
5. The Board found that Mr. Fleming testified that the Property is unique because it is a small lot.
6. The Board found that Mr. Fleming testified that the Property is located in Dogwood Acre and there are many non-conformities in the neighborhood.
7. The Board found that Mr. Fleming testified that the Applicant replaced a previous manufactured home with a newer manufactured home. The prior home measured 12 feet wide and was 26 feet from the front property line. The newer home is wider and has to meet the 30 feet front yard setback requirement.
8. The Board found that Mr. Fleming testified that the Property could not otherwise be developed because of the placement of the septic system.
9. The Board found that Mr. Fleming testified that the exceptional practical difficulty was not caused by the Applicant but by the builder. The builder assumed that steps and HVAC could encroach into setback but, after the dwelling was built, the builder discovered that steps and HVAC cannot encroach farther in a small lot with 5 feet setbacks.
10. The Board found that Mr. Fleming testified that the variances will not alter the essential character of the neighborhood but improve it as the lot has been developed with a new manufactured home.

11. The Board found that Mr. Fleming testified that there is a pole barn on the neighbor's property near the steps so it will not be a visual nuisance in the area.
12. The Board found that Mr. Fleming testified that the HVAC can be moved to the rear of the house and that the steps can be moved but would result in the home only having one access.
13. The Board found that Mr. Fleming testified that this is a minimum variance request to allow relief.
14. The Board found that Mr. Fleming testified that the shed has been on the Property for 17 years.
15. The Board found that Mr. Witmer testified that the shed was built by a prior owner and is located on cement blocks. He is not sure the shed could handle a move.
16. The Board found that Harry Backus was sworn in to give testimony in opposition to the Application. Fred Townsend, Esquire, appeared on behalf of Harry and Joyce Backus and he submitted photographs to Board members.
17. The Board found that Mr. Townsend stated that the Applicant has not met the criteria for granting a variance and that failure to meet one element of the variance criteria requires the Board to deny the request.
18. The Board found that Mr. Townsend stated that the lot is small but it is rectangular and not unique.
19. The Board found that Mr. Townsend stated that Sussex County Council reduced the side yard setback requirements to afford relief to smaller lots. He argued that side yard setbacks reduce fire risks, improve aesthetics, and reduce the appearance of density.
20. The Board found that Mr. Townsend stated that the house could have been located on the Property without a variance and that the Property could have been otherwise developed because the dwelling could have been moved nearer to the center of the lot.
21. The Board found that Mr. Townsend stated that the variances are not in keeping with the neighborhood.
22. The Board found that Mr. Townsend stated that the exceptional practical difficulty was caused by the Applicant's builder.
23. The Board found that Mr. Townsend stated that the variances requested are not the minimum variances to afford relief.
24. The Board found that Mr. Townsend stated that the landing is 53 inches and could be smaller and a door could be added to the rear.
25. The Board found that Mr. Backus affirmed the statements by Mr. Townsend as true and correct. Mr. Backus testified that his only issue is with the side yard variances adjacent to his lot line.
26. The Board found that Mr. Witmer testified that the drain field was installed in 2006 and that compliance with the front yard setback requirement created a problem because he could not meet the front yard setback requirement and not hit the septic system or drain field.
27. The Board found that Mr. Witmer testified that he contracted with Oakwood Homes to place the home on the lot and that he did not tell Oakwood Homes where to locate the house.
28. The Board found that Mr. Fleming testified that the Applicant reviewed the proposed survey and approved it but the siting of the home was changed in the field due to the discovery of the septic system.
29. The Board found that Mr. Fleming testified that, if the house was moved to the center of the lot, the house would have been located on top of the septic system.
30. The Board found that no one appeared in support of and two parties appeared in opposition to the Application.
31. 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 shed met the standards for granting a variance. The findings below further support the Board's decision to approve the variance requests for the shed.

- a. The Property is unique as it is a small lot measuring only 5,000 square feet and is improved with a septic system located in the building envelope. Due to the location of the septic system, the area where a shed can be located is limited. Furthermore, the shed was placed on the Property by a prior owner approximately 17 years ago. Due to the age and condition of the shed, it is unlikely that it could be moved into compliance with the Code. These conditions have created an unnecessary hardship and exceptional practical difficulty for the Applicant who seeks to retain an existing shed on the Property but cannot do so in compliance with the Sussex County Zoning Code.
- b. The unnecessary hardship and exceptional practical difficulty related to the shed are not being created by the provisions of the Sussex County Zoning Code.
- c. Due to the uniqueness of the Property, the Property cannot be developed with the shed in strict conformity with the Sussex County Zoning Code. The Applicant proposes to retain an existing shed but is unable to do so without violating the setback requirements. The variances for the shed are thus necessary to enable reasonable use of the Property. The Board is convinced that the shape and location of the shed are also reasonable (which is confirmed when reviewing the survey). The shed has been in its current location for 17 years and cannot likely be moved into compliance due to the location of the septic system and the age and condition of the shed.
- d. The unnecessary hardship and exceptional practical difficulty were not created by the Applicant. The Applicant did not create the size and shape of the lot or place the existing shed on the Property. Rather, a prior owner placed that structure on the Property. Furthermore, the building envelope is constrained due to the size of the lot and the location of the septic system. The unique conditions of the Property have created an unnecessary hardship and exceptional practical difficulty for the Applicant who seeks to retain the existing shed.
- e. The variances for the shed 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 shed will not have a negative impact on the neighborhood. The shed has been in its present location for many years yet no complaints were noted in the record about its location. No evidence was presented which convinced the Board that the shed would somehow alter the essential character of the neighborhood or be detrimental to the public welfare. The lack of evidence is telling since the shed has been on the lot for many years.
- f. The variances sought for the shed are the minimum variances necessary to afford relief and the variances requested represent the least modifications possible of the regulations at issue. The Applicant has demonstrated that the variances sought for the shed will allow the Applicant retain the existing shed. No additions or modifications to the shed are proposed and the shed cannot be moved due to its age and condition.
- 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.

32. 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 variances for the HVAC system and the steps failed to meet the standards for granting a variance. The findings below further support the Board's decision to deny those variance requests.
- a. The Applicant failed to prove that a reasonably sized HVAC system and steps could not be built in strict conformity with the Sussex County Zoning Code. The Applicant's builder admitted that the HVAC system could be moved to the rear of the house and the Board was not convinced that the steps to the house could not otherwise be located on the lot either. Ultimately, the Applicant failed to convince the Board that the steps and HVAC system could not be constructed in compliance with the Code. Perhaps these structures would not be in the exact location where the Applicant wants them to be located but the Property appears to have a large enough building envelope for the Applicant to place these structures in compliance with the Sussex County Zoning Code. For these reasons, the Board finds that the Property could be developed in strict conformity with the Code and that the variances for these structures are not necessary to enable reasonable use of the Property.
 - b. The Board finds that the Applicant created his own exceptional practical difficulty by placing an HVAC system and steps which do not fit within the building envelope. The Board was not convinced that there is no unusual condition to the Property which has created this difficulty. The building envelope appears to otherwise be able to fit a reasonably sized house without the need for the variance and the Applicant's builder clearly testified that the HVAC system could be moved to the rear of the home. Likewise, the Board was not convinced that the steps could not be otherwise located on the lot. The Board was not convinced that the variance requests for those structures were the product of a *need*. Instead, those variance requests appears to be the product of a *want* as the Applicant seeks to retain the HVAC system and steps for purposes of convenience, profit, and / or caprice. Since the Applicant can place those structures on the lot 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 his own exceptional practical difficulty.
 - c. Since the variances for the steps and HVAC system are not necessary to enable the reasonable use of the Property, the Board also finds that the variances requested for the HVAC system and the steps are not the minimum variance necessary to afford relief. Furthermore, the Board finds that no variance is needed to afford relief since there is space to otherwise place those structures on the Property in compliance with the Sussex County Zoning Code.

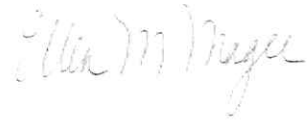
The Board approved the variances for the shed but denied the variances for the HVAC system and the steps.

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 in part and deny in part were Mr. Jeffrey Chorman, Ms. Ellen Magee, Mr. John Williamson, and Mr. Brent Workman. No Board Member voted against the Motion to approve in part and deny

in part the variance application. Dr. Kevin Carson 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 November 19, 2019