

BEFORE THE BOARD OF ADJUSTMENT OF SUSSEX COUNTY

IN RE: RICHARD KAPOLKA

(Case No. 12363)

A hearing was held after due notice on September 16, 2019. The Board members present were: Dr. Kevin Carson, Ms. Ellen Magee, Mr. John Williamson, and Mr. Brent Workman.

Nature of the Proceedings

This is an application for a from the side yard setback and separation distance requirements for proposed structures.

Findings of Fact

The Board found that the Applicant is requesting a variance of 8.0 feet from the twenty (20) feet side yard setback requirement on the northwest side and a variance of 8.1 feet from the twenty (20) feet side yard setback requirement on the northwest side for an existing shed attached to the dwelling. This application pertains to certain real property located on the south side of Bayview Circle East approximately 130 feet west of Oliver Drive within the Bayview Landing subdivision (911 Address: 37951 Bayview Circle East, Selbyville); said property being identified as Sussex County Tax Map Parcel Number 5-33-13.00-64.00. After a hearing, the Board made the following findings of fact:

1. The Board was given copies of the Application, an aerial photograph of the Property, a survey of the Property dated December 4, 2018, pictures, a letter from RIGHT Property Management, elevation certificates, drawings, and a petition in support of the Application, 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 and two letters in opposition to the Application.
3. The Board found that Richard Kapolka was sworn in to testify about the Application.
4. The Board found that Mr. Kapolka testified that he is requesting a variance for a shed that was constructed in 2015 and that the homeowners association approved the shed at that time.
5. The Board found that Mr. Kapolka testified that the Property is unique as it is an outside unit of a 4-unit townhome which backs up to common space that floods and spills over into the rear yard.
6. The Board found that Mr. Kapolka testified that the neighbor most affected by the encroachment supports the request.
7. The Board found that Mr. Kapolka testified that it cannot be otherwise developed for a shed as he plans to put a sunroom to the rear of the home.
8. The Board found that Mr. Kapolka testified that the Applicant did not create the flooding in the rear yard.
9. The Board found that Mr. Kapolka testified that the variances will not affect the essential character of the neighborhood as there are many sheds in the area.
10. The Board found that Mr. Kapolka testified that the vinyl siding, roof shingles, and windows on the shed match the house.
11. The Board found that Mr. Kapolka testified that the variances requested are the minimum variances to allow the existing shed to remain on the Property.
12. The Board found that Mr. Kapolka testified that he is aware the shed may have to be removed.
13. The Board found that Mr. Kapolka testified that there is water in the rear yard and he cannot build in the rear yard due to the water but he plans to build a sunroom in the rear yard over the patio.

14. The Board found that Mr. Kapolka testified that the Sussex Conservation District has examined the drainage in the neighborhood and one stormwater pond has overflowed.
15. The Board found that Mr. Kapolka testified that the Property is serviced by public sewer.
16. The Board found that Mr. Kapolka testified that he built the shed without a permit and that the shed could be constructed in compliance with the Code.
17. The Board found that Dee Michael, Ronald C. Pickup, Audrey Pickup, and Claudia Leek were sworn in to give testimony in opposition to the Application.
18. The Board found that Ms. Michael testified that she received a variance to build a shed on her property and that she obtained her variance prior to placing the shed. She believes that all residents should follow the rules by applying for a variance prior to construction.
19. The Board found that Mr. Pickup, who is a neighbor, testified that he also has a shed but received approval before construction. He believes that the Applicant built a shed without County approval. He also acknowledged that there are temporary flooding problems after heavy rains.
20. The Board found that Ms. Pickup testified that there have been occasional flash floods in the development but the flooding drains within 45 minutes to one hour.
21. The Board found that Ms. Leek submitted information from the County website pertaining to the violations on the Applicant's property.
22. The Board found that Ms. Leek testified that the Applicant did not obtain permits for his outdoor shower or for the shed.
23. The Board found that Ms. Leek testified that Mr. Kapolka was president of the HOA and he was aware of the rules.
24. The Board found that Mr. Kapolka testified that he thinks he knew that he needed a variance prior to building the shed but he built it anyway.
25. The Board found that no one appeared in support of and four people appeared in opposition to the Application.
26. 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 failed to meet the standards for granting a variance. The findings below further support the Board's decision to deny the Application.
 - a. The Applicant failed to prove that the Property has some unique condition which has created an exceptional practical difficulty. Rather, the issue appears to be entirely self-created by the Applicant. The Applicant owns an end unit townhouse and there was no evidence that the lot had some unique characteristic which prohibited the Applicant from constructing this improvement in compliance with the Code. Notably, the Applicant was aware of the need for a building permit prior to construction but built the structure anyway. The Applicant referenced flooding to the rear of the Property but the Applicant also admitted that he plans to erect a sunroom in the rear yard. The area where the sunroom is proposed, however, is an area where the shed could be located.¹ Ultimately, the need for the variance is not due to the Property's condition but due to the Applicant's construction of the structure in the building envelope.
 - b. 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 constructed the shed / improvement on this lot such that the structure encroaches into the setback areas. The Applicant argues that there is no other place the shed could be located but it is clear that a significant portion

¹ The Board also notes that the shed is not really a shed because it is attached to the dwelling. The County Code defines an accessory building, such as a shed, as a detached structure.

of the building envelope is proposed to be used for a sunroom. It is clear to the Board that the Applicant has chosen to use this portion of the lot for something other than the sunroom. Notably, the area of the existing patio where the sunroom will be located is larger than the footprint of the shed. The Board was simply not convinced that the Applicant could not otherwise place the shed on the Property in compliance with the Code. The rear of the Property is essentially a blank slate for the Applicant to design his shed in compliance with the Code. Perhaps the shed would not be in the exact location where the Applicant wants it to be located but the Property appears to have an area where a reasonably sized shed could be constructed 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 are not necessary to enable reasonable use of the Property.

- c. The Board finds that the Applicant has created his own exceptional practical difficulty by constructing a shed / structure which does not fit within the building envelope. The Applicant's decision to construct this structure 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. There is no unusual condition to the Property which has created this difficulty. The building envelope appears to otherwise be able to fit a shed without the need for the variance. 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 seek to build the shed as proposed for purposes of convenience, profit, and / or caprice. Since the Applicant can build a shed that can comply 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.
- d. Since the variances are not necessary to enable the reasonable use of the Property, the Board also finds that the variances requested are not the minimum variances necessary to afford relief. Furthermore, the Board finds that no variance is needed to afford relief since there is space to build a reasonably sized shed on the Property in compliance with the Sussex County Zoning Code.

The Board denied the variance application finding that it failed to meet the standards for granting a variance.

Decision of the Board

Upon motion duly made and seconded, the variance application was denied. The Board Members in favor of the Motion to deny were Dr. Kevin Carson, Ms. Ellen Magee, Mr. John Williamson, and Mr. Brent Workman. No Board Member voted against the Motion to deny the variance application. 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 November 19, 2019