

**BEFORE THE BOARD OF ADJUSTMENT OF SUSSEX COUNTY**

**IN RE: FREDERICK H. GUNTHER**

**(Case No. 12365)**

A hearing was held after due notice on October 7, 2019. The Board members present were: Dr. Kevin Carson, Mr. Jeff Chorman, Ms. Ellen Magee, Mr. John Williamson, and Mr. Brent Workman.

Nature of the Proceedings

This is an application for a variance from the side yard setback requirements for existing structures.

Findings of Fact

The Board found that the Applicant is seeking a variance of 3.25 feet from the five (5) feet side yard setback requirement on the south side for an existing HVAC system. This application pertains to certain real property located on the west side of Grant Avenue approximately 0.22 miles south of Lincoln Drive within the Cape Windsor subdivision (911 Address: 38828 Grant Avenue, Selbyville); said property being identified as Sussex County Tax Map Parcel Number: 5-33-20.18-36.00. 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 August 23, 2018, a copy of the building permit, 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 12 letters in opposition to the Application.
3. The Board found that Frederick Gunther was sworn in to testify about the Application. Mr. Gunther submitted exhibits to the Board to review.
4. The Board found that Mr. Gunther testified that the Property is a small lot under 5,000 square feet and is located in Cape Windsor, which is a community that has evolved over the years from a manufactured home park to a community with stick-built 3- and 4-story homes. He has owned his lot for 14 years.
5. The Board found that Mr. Gunther testified that the community does not allow parking on the street so that access for emergency vehicles is not impeded. Originally, the Applicant had 2 parking spaces and the home was placed to one side to allow for additional parking on the lot. He has since removed the prior home and erected the new house which meets the setback requirements.
6. The Board found that Mr. Gunther testified that the exceptional practical difficulty was not caused by the Applicant but by the builder, Insight Homes.
7. The Board found that Mr. Gunther testified that he placed on the HVAC on the south side because the electrical system was located there.
8. The Board found that Mr. Gunther testified that the new house is shorter and provides more parking.
9. The Board found that Mr. Gunther testified that the Board approved other variances in the neighborhood.
10. The Board found that Mr. Gunther testified that he received a building permit and told Insight Homes were to place the house.
11. The Board found that Mr. Gunther testified that he would have to rewire the HVAC system to comply and that would be a financial hardship.
12. The Board found that Mr. Gunther testified that the new HVAC system is smaller and quieter than the prior HVAC system.

13. The Board found that Mr. Gunther testified that he wanted parking in the side yard and front yard. He believes he would lose parking for his boat if the HVAC system was moved
14. The Board found that Mr. Gunther testified that he is concerned about the noise of the HVAC system if he placed it close to his rear deck.
15. The Board found that Mr. Gunther testified that the variance will not alter the character of the neighborhood as many homes in Cape Windsor have HVAC systems in the 5 feet setback.
16. The Board found that Irma Curtis Codey, Carol Naylor, and David Yates were sworn in to give testimony in opposition. Ms. Naylor and Ms. Codey submitted exhibits for the Board to review.
17. The Board found that Ms. Naylor testified that she lives to the south of the Applicant's property and that she would be most impacted from the noise of the units.
18. The Board found that Ms. Naylor testified that the Applicant continued work following the stop work order.
19. The Board found that Ms. Naylor testified that the ordinance states that properties that benefit from the small-lot ordinance cannot have structures in the 5 feet side yard setback.
20. The Board found that Ms. Naylor testified that she believes the HVAC could be otherwise located on the lot.
21. The Board found that Ms. Naylor testified that the home is a 3-story house with a garage underneath the house.
22. The Board found that Ms. Curtis Codey testified that she lives across the street from the Applicant.
23. The Board found that Ms. Curtis Codey testified that the Applicant has more parking than others in the neighborhood.
24. The Board found that Ms. Curtis Codey testified that the Applicant did not meet the criteria for granting a variance.
25. The Board found that Ms. Curtis Codey testified that the hardship was created by the Applicant.
26. The Board found that Ms. Curtis Codey testified that the Property can be developed with an HVAC system on the lot.
27. The Board found that Ms. Curtis Codey testified that she has concerns about the noise of the unit.
28. The Board found that Ms. Curtis Codey testified that the work did not stop after the stop work order was issued.
29. The Board found that Ms. Curtis Codey testified that the lot is small but not unique.
30. The Board found that no one appeared in support of and six 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 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 demonstrate that the Property had a unique physical condition which created an exceptional practical difficulty. While the Property is an undersized lot, the lot also benefits from the County's small lot ordinance which provides for relaxed setback requirements. These requirements have left a large part of the lot available for building; though HVACs cannot encroach into the setback areas. Despite this increased building envelope, the Applicant failed to construct his home with HVAC systems in compliance with the Code. While the home meets the setback requirements, the HVAC units do not. The Applicant's failure to do so is puzzling since he admitted that he directed his builder where to place the



structures and he received a building permit which stated an even larger setback requirement than was allowed. The Applicant has simply failed to demonstrate that there were unique conditions on the Property which have created this exceptional practical difficulty.

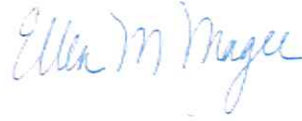
- b. The Applicant failed to prove that a reasonably sized HVAC system could not be built in strict conformity with the Sussex County Zoning Code. The Applicant is constructing a new HVAC system on this lot and he has worked with a builder to design the house. Prior to construction, the Applicant had a blank slate upon which to work. Despite this blank slate, he failed to construct the HVAC system in compliance with the Code. Notably, however, there is room on the north side of the lot where an HVAC system could be located. The Applicant argues that he needs this space for parking but his lot already has much more parking than the lot had prior to construction of the new home. He also has more parking than other lots in the neighborhood as testified by a neighbor. The Applicant also argued that the relocation of the HVAC system could result in too much noise to his back deck. This argument, however, fails to consider the impact the noise from the HVAC system may have on his neighbor to the south if placed within the side yard setback area. It is clear to the Board that the Applicant has chosen to use other available portions of the lot for something other than the HVAC system. The Board was simply not convinced that the Applicant could not otherwise place the HVAC system on the Property in compliance with the Code. Perhaps the HVAC system would not be in the exact location where the Applicant wants it to be located but the Property appears to have a large enough building envelope for the Applicant to construct a reasonably sized HVAC system 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 is creating his own exceptional practical difficulty by placing an HVAC system which does not fit within the building envelope. The Applicant's decision to place this HVAC system 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 an HVAC system 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 HVAC system as proposed for purposes of convenience, profit, and / or caprice. Since the Applicant can build an HVAC system 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 variance is not necessary to enable the reasonable use of the Property, the Board also finds that the variance requested is 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 place a reasonably sized HVAC system 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, Mr. Jeffrey Chorman, Ms. Ellen Magee, Mr. John Williamson, and Mr. Brent Workman. No Board Member voted against the Motion to deny the variance 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