

BEFORE THE BOARD OF ADJUSTMENT OF SUSSEX COUNTY

IN RE: BARBARA J. BAINUM, TRUSTEE

(Case No. 12462)

Public hearings were held after due notice on August 17, 2020, and September 14, 2020. The Board members present at the meeting on August 17, 2020, were: Dr. Kevin Carson, Mr. Jeff Chorman, Ms. Ellen Magee, Mr. John Williamson and Mr. Brent Workman. The Board members present at the meeting on September 14, 2020, were: Dr. Kevin Carson, Mr. Jeff Chorman, Ms. Ellen Magee, and Mr. John Williamson.

Nature of the Proceedings

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

Findings of Fact

The Board found that the Applicant is requesting a variance of 9.1 feet from the thirty (30) feet front yard setback requirement for existing uncovered stairs and a variance of 5 feet from the five (5) feet side yard setback requirement on the north side for an existing deck and steps. This application pertains to certain real property that is located on the east side of Windswept Way within the Ocean Breezes subdivision (911 Address: 39701 Windswept Way, Bethany Beach); said property being identified as Sussex County Tax Map Parcel Number 1-34-9.00-535.00. 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 March 27, 2020, a building permit application, a certificate of occupancy, a deed to the Property, a building permit plan set, DNREC approval letters, pictures, 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 one letter in support of and no correspondence in opposition to the Application.
3. The Board found that Barbara Bainum and Wilfred Busse were sworn in to give testimony about the Application. David Hutt, Esquire, presented the Application on behalf of the Applicant.
4. The Board found that Mr. Hutt stated that the subject property is ocean front and is in the Ocean Breezes subdivision near Bethany Beach between Route 1 and the Atlantic Ocean.
5. The Board found that Mr. Hutt stated that the Property is zoned Medium Residential (MR) and the minimum lot size for an MR lot is 10,000 square feet.
6. The Board found that Mr. Hutt stated that the Building Flood Elevation and the DNREC setback requirements dictated the location of the house.
7. The Board found that Mr. Hutt stated that the lot consists of approximately 13,000 square feet, but more than half of the lot is unbuildable because of the DNREC building line.
8. The Board found that Mr. Hutt stated that, on the north side of the lot, there is a beach access easement with a boardwalk for the neighborhood and the Applicant has placed steps to connect the property to the dune crossover.
9. The Board found that Mr. Hutt stated that the house meets the front yard setback requirement but the steps to the dwelling extend 9.1 feet into the front yard setback.
10. The Board found that Mr. Hutt stated that the Property cannot otherwise be developed as the steps are existing and are needed for access to the raised dwelling.
11. The Board found that Mr. Hutt stated that the home was constructed per the approved permit documentation and the Applicant was unaware that a variance would be required until the final inspection.

12. The Board found that Mr. Hutt stated that DNREC has approved the structures including the stairs and the crossover.
13. The Board found that Mr. Hutt stated that the original building permit was obtained in October 2015 but regulatory changes occurred in the interim and the building plans had to be redesigned. New plans were submitted in October 2016.
14. The Board found that Mr. Hutt stated that the construction received significant scrutiny including from the Ocean Breezes subdivision and that the homeowners association supports the request.
15. The Board found that Mr. Hutt stated that the Property is unique because it is an oceanfront lot subject to DNREC building restrictions.
16. The Board found that Mr. Hutt stated that the building envelope is less than half the size of a building envelope for a normal MR lot.
17. The Board found that Mr. Hutt stated that the Property is also subject to base flood elevation regulations.
18. The Board found that Mr. Hutt stated that the Property cannot otherwise be developed and the variances are necessary to enable reasonable use of the Property.
19. The Board found that Mr. Hutt stated that the house could not be constructed farther east due to the DNREC regulations.
20. The Board found that Mr. Hutt stated that the structures will not alter the essential character of the neighborhood and seem to be similar to other neighboring properties.
21. The Board found that Mr. Hutt stated that this request is to address as-built situation and represents the full extent of the needed variance. No further relief is requested.
22. The Board found that Mr. Hutt stated that there is approximately 10 feet between the property line and edge of paving.
23. The Board found that Mr. Hutt stated that the variances requested are the minimum variances to afford relief.
24. The Board found that Mr. Hutt stated that there is not much traffic along Windswept Way.
25. The Board found that Ms. Bainum affirmed the statements made by Mr. Hutt as true and correct.
26. The Board found that Ms. Bainum testified that Windswept Way is not a high traffic area as there are only 23 homes in the subdivision.
27. The Board found that Ms. Bainum testified that there have been no complaints from neighbors.
28. The Board found that Ms. Bainum testified that the architectural committee approved the steps to the dune crossover and the steps to the dwelling.
29. The Board found that Mr. Busse testified that the dune restrictions prevent them from accessing the beach without the walkway to the dune crossover.
30. The Board found that Mr. Hutt stated that there is an easement to the north side of the lot and the stairs will be used to access that easement.
31. The Board found that Ms. Bainum testified that the crossover is the safest way to access the beach.
32. The Board found that no one appeared in support of or opposition to the Application.
33. The Board left the record open until September 14, 2020, at which time the Board held a second hearing on the matter. Mr. Hutt appeared at that hearing on behalf of his clients. A new survey was also submitted as part of the record.
34. The Board found that no one appeared in support of or opposition to the Application at the second hearing either.
35. 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 long, narrow lot subject to significant DNREC building restrictions. The Property is adjacent to beaches of the Atlantic Ocean and much of the easterly side of the lot is undevelopable due to the DNREC building restrictions. As such, the building is pushed towards the western side of the Property adjacent to Windswept Way. While the house meets the setback requirements, the steps to the house project into the front yard setback area. Furthermore, the house is adjacent to a boardwalk access easement used by the community to access the beach. Due to the dune line, the Applicant is unable to reach the rear of her property from the front of the lot and uses the access easement to rear the rear of the lot. In order to connect to the boardwalk, the Applicant has constructed a small set of steps to the north side of the lot. The Property's unique conditions have thus created an unnecessary hardship and exceptional practical difficulty for the Applicant who seek to retain the steps and deck.
- 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 Property and the situation, the Property cannot be developed in strict conformity with the Sussex County Zoning Code. The Applicant seeks to retain the existing steps and deck on the lot but is unable to do so while complying with the Sussex County Zoning Code. The Board is thus convinced that the variances are necessary to enable the reasonable use of the Property as the variances will allow the Applicant to retain the reasonably sized deck and steps on the lot. The Board is convinced that the size, shape, and location of the structures are reasonable.
- d. The unnecessary hardship and exceptional practical difficulty were not created by the Applicant. As discussed above, the Property has unique conditions which have limited the Applicant's ability to reasonably develop the Property. The Applicant did not create the unique conditions of the lot. The Board was convinced that the Applicant have not created the exceptional practical difficulty and unnecessary hardship. Furthermore, the Board is convinced that the Applicant did not come to the Property with an illegal use in mind. Rather, the Applicant is limited by the physical conditions of the Property and the DNREC and flood plain regulations and the Applicant needs the variances in order to retain the existing steps and deck.
- e. The variances 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 variances will have no effect on the character of the neighborhood. The variances will allow the existing deck and steps to remain in their current location. There were no complaints about the location of the structures and the homeowners association has approved the same. The Board also notes that the front yard property line does not match the edge of paving of Windswept Way so it is unlikely that the front yard encroachment is even noticeable without a survey. Likewise, there was no objection to the structures and no evidence was presented which demonstrate that the variances would somehow alter the essential character of the neighborhood or be detrimental to the public welfare.
- f. The variances sought 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 will allow the Applicant to retain the existing steps and deck on the Property. No additions or modifications to the structures are proposed.

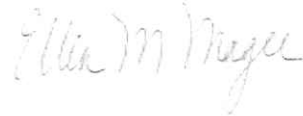
- g. The condition or situation of the Property and the intended use of the Property is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the Sussex County Zoning Code.

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 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 2, 2020