

BEFORE THE BOARD OF ADJUSTMENT OF SUSSEX COUNTY

IN RE: JOHN GIROUARD & COLLEEN GIROUARD

(Case No. 12487)

A public hearing was held after due notice on November 2, 2020. 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 variances from the front yard setback requirements for proposed structures.

Findings of Fact

The Board found that the Applicants are requesting a variance of 15 feet from the thirty (30) feet front yard setback requirement for a proposed deck and stairs. This application pertains to certain real located on the east side of Hassell Avenue Ext., approximately 346 feet south of Hassell Avenue in the Bay View Park Subdivision (911 Address: 34978 Hassell Avenue Ext., South Bethany); said property being identified as Sussex County Tax Map Parcel Number 1-34-20.11-25.00. After a public 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 memorandum from the Planning & Zoning Department with various exhibits, a survey of the Property dated October 26, 2018, a survey of nearby property dated December 7, 2007, a drawing, the Findings of Fact for Case No. 12291, correspondence from James Fuqua and Jamie Whitehouse, a site plan dated February 13, 2019, a survey dated November 22, 2019, proposed conditions, and a portion of the tax map of the area.
2. The Board notes that the Applicants also filed an appeal of a decision of the Planning & Zoning Director. Per the request of the Applicants, the variance application was heard first and, if approved, the appeal would be mooted and withdrawn. This is the Board's decision on the variance application.
3. The Board also recognizes that the Property is the same property which was the subject of Case No. 12291 which was a variance request that was approved but modified by the Board.
4. The Board found that the Office of Planning & Zoning received no letters in support of and three letters in opposition the Application.
5. The Board found that Colleen Girouard, John Girouard, Eric Bedford, Jonathon Selway, and Scott Edmondson were sworn in to give testimony about the Application. The Applicants were represented by James Fuqua, Esquire, who presented the Application.
6. The Board found that Mr. Fuqua stated that, in 2019, the Girouards contracted to buy a lot in Bayview Park located south of Bethany Beach and the lot is located on the east side of Hassell Avenue Extended which is a dead-end street located in the back of the development.
7. The Board found that Mr. Fuqua stated that there are only three lots in this area of Hassell Avenue Extended and none on the west side of the street as there are wetlands on the other side. The property is adjacent to Cedar Pond to the east, a vacant lot to the north (the Schultz lot), and an improved lot to the south (the Wigley lot).

8. The Board found that Mr. Fuqua stated that, in 2019, the Applicants sought a variance of 18 feet for a dwelling and the Board considered and approved that request with a modification that reduced the variance to 10 feet. The previous application was identified as Case No. 12291 and was heard by the Board on April 15, 2019 with a written decision issued on June 18, 2019.
9. The Board found that Mr. Fuqua stated that, in August 2019, the Applicants purchased the lot and the Applicants retained an architectural firm to design a house to be built on the lot.
10. The Board found that Mr. Fuqua stated that the new house complies with the 20-foot setback as per the variance approval and that most of the structures of the new house also meet the 20-foot setback except for the deck that extends into the front setback.
11. The Board found that Mr. Fuqua stated that the deck was within the footprint of the existing non-conforming house.
12. The Board found that Mr. Fuqua stated that the plans were submitted to the County for permits so that construction could commence but, when the plans were reviewed, the Planning & Zoning Director determined that because the non-conforming section of the property was being used the matter would need Board of Adjustment approval for a new variance.
13. The Board found that Mr. Fuqua stated that, because the property most impacted by this request is the home of Mr. and Mrs. Wigley, the Applicants discussed their plans with the Wigleys and sought their input. He noted that, at the previous hearing, the Wigleys recognized that the physical size and condition of the Girouards' lot justified a variance and the Wigleys supported a 10-foot variance rather than the 18-foot variance originally requested.
14. The Board found that Mr. Fuqua stated that the Wigleys' main concern was regarding the narrowness of the road, the ability for emergency vehicles to access their lot, and potential street parking that could block access to their property.
15. The Board found that Mr. Fuqua stated that, after the original hearing, the Wigleys and Girouards reached a consensus that both could agree on and that is the request before the Board with this application.
16. The Board found that Mr. Fuqua stated that the variance now requested will permit two open uncovered stairways and a wedge shaped portion of an open deck to extend no more than five feet into the 20-foot front yard setback.
17. The Board found that Mr. Fuqua stated that the stairs and the deck will not exceed the first elevated floor level of the new house and the deck will not exceed 33 feet in width.
18. The Board found that Mr. Fuqua stated that the stairs and deck will have an actual setback of 15 feet and the variance is limited to the stairs and deck as the rest of the house will be in conformity of the permitted 20-foot front yard setback.
19. The Board found that Mr. Fuqua stated that the Board has already determined that this lot meets the legal standards for granting a front yard variance and detailed in the findings of fact for Case No. 12291.
20. The Board found that Mr. Fuqua stated that this Application is to allow for a very minor adjustment to permit the stairway and deck.
21. The Board found that Mr. Fuqua stated that the variance will also be consistent with the character of the community and the past history of variances within the development.
22. The Board found that Mr. Fuqua stated that the adjacent property to the north which is owned by the Schultzes has a 15-foot setback on the corner front and a 12.1-foot setback on the front portion of the property adjacent to the subject property. The front yard setback on that lot was likely created by averaging the front yard setbacks along the street and was approved by the prior Planning & Zoning Director.

23. The Board found that Mr. Fuqua stated that, if a dwelling were constructed on the Schultz property, the Schultzes would have a lesser setback from the road than the Applicants are requesting.
24. The Board found that Mr. Fuqua stated that the information regarding the Schultz setbacks was not known by the Board at the previous hearing and is a substantial factual change.
25. The Board found that Mr. Fuqua stated that the Applicants intend to install plantings between Hassell Avenue Ext. and the house.
26. The Board found that Mr. Fuqua stated that the Applicants will provide two garage parking spaces and five additional off-street parking spots on the lot for a total of 7 parking spaces.
27. The Board found that Mr. Fuqua stated that the Wigleys consent to the approval if the conditions are approved.
28. The Board found that Mr. Fuqua's witnesses affirmed his statements to be true and correct.
29. The Board found that Mr. Fuqua submitted proposed conditions of approval to the Board members.
30. The Board found that Mr. Fuqua stated that the Wigleys are the most affected neighbor and the variance resolves outstanding issues with the Wigleys.
31. The Board found that Mr. Fuqua stated that he had some concern about the effect of the Girouard request on the neighbor's setback but his later research and the Planning & Zoning confirmation that the Schultz setback existed changed his mind.
32. The Board found that Mr. Edmondson testified that he is the Applicants' architect.
33. The Board found that Mr. Edmondson testified that the boat slip will be removed.
34. The Board found that Mr. Edmondson testified that, at the original hearing it was represented that the Applicants' property extended into Cedar Pond but the property actually ends at the bulkhead and the lot is smaller than originally thought.
35. The Board found that Mr. Edmondson testified that the 10-foot variance was granted with the understanding that the property was larger. Since the lot is smaller, the Applicants have lost 398 square feet of building envelope.
36. The Board found that Mr. Edmondson testified that the proposed house cannot be moved farther back on the lot and that the Applicants must also meet the DNREC setback requirements.
37. The Board found that Mr. Edmondson testified that the steps and deck are parallel with the house but at an angle from the road so they will require lesser variances on the north side of each structure.
38. The Board found that Mr. Michael and Ms. Susan Wigley were sworn in to give testimony in support of the Application.
39. The Board found that Mr. Wigley testified that there is no doubt that variances are necessary for the reasonable use of these small properties.
40. The Board found that Mr. Wigley testified that the architect for the Girouard project discussed the house plans with them and they are impressed with the design and credits the Applicants and their architect for the new design.
41. The Board found that Mr. Wigley testified that the Applicants also worked on improving parking on the lot.
42. The Board found that Mr. Bayard Allmond was sworn in to give testimony in opposition to the Application.
43. The Board found that Mr. Allmond testified that he represents the Homeowners Association and that it is the Association's position that all structures should be built within the previously granted setbacks.
44. The Board found that Mr. Allmond testified that life safety issues are important in Bayview Park.
45. The Board found that three people appeared in support of and one person appeared in opposition to the Application.

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 there has been a substantial change of conditions or other conditions which materially affect the merits of the request have intervened.
- a. The Board previously approved a variance of 10 feet from the front yard setback requirement for a proposed dwelling but the Board refused to grant a larger variance. See the Board's decision in Case No. 12211.
 - b. Since that decision was rendered, the Applicants has consulted with an architect and learned that the lot is actually smaller than originally believed and the rear portion of the lot is reduced thereby reducing the building envelope.
 - c. Furthermore, the Applicants provided information that a neighboring property has a recorded reduced front yard setback requirement. This information was not provided at the initial hearing because the Applicant was not sure if the development on the Applicants' lot would affect the neighbor's front yard setback requirement. That question has since been answered.
 - d. The Applicants have also retained an architect to redesign their house and the Applicants have consulted with the neighbors who initially opposed the initial variance application. Throughout that consultation, the Applicants have designed a dwelling that alleviates their neighbors concerns.
 - e. These findings confirm that there has been a substantial change in conditions affecting the property and that there has been a substantial change in the proposed use or plans for the use.
47. 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 met the standards for granting a variance with conditions. The findings below further support the Board's decision to approve the Application.
- a. The Property is unique in size, shape, and condition. The lot is an undersized lot adjacent to Cedar Pond subject to DNREC requirements. The shape of the lot is unique because the north side of the lot is deeper than the south side of the lot. The Property also has unique conditions as the rear yard is susceptible to flooding. These conditions have created a small and unusually shaped building envelope where it is more desirable to build the lot closer to the front yard than the rear yard. These unique characteristics of this Property limit the buildable area available to the Applicants and have created an exceptional practical difficulty and unnecessary hardship for the Applicants who seek to construct a deck and stairs 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 a unique size, shape, and condition and the buildable area thereof is limited due to these conditions. The Applicants seek to construct a deck and stairs on the lot but are unable to do so without violating the Sussex County Zoning Code. The Board is convinced that a front yard variance is necessary to enable the reasonable use of the Property as the variance will allow a reasonably sized deck and stairs to be constructed on the lot. Neighbors acknowledge that the Applicants would not be able to build a dwelling on the lot in strict conformity with the Code and that a front yard variance is necessary so that they can reasonably use the Property. The

- survey and photographs clearly demonstrate the challenges with building towards the rear of the lot.
- d. The exceptional practical difficulty and unnecessary hardship were not created by the Applicants. The Applicants did not create the unusual conditions of the Property. The lot was created in the late 1950s or early 1960s and the Applicants only recently purchased the lot. The preexisting conditions have resulted in a limited building envelope on the Property and the small building envelope has created the exceptional practical difficulty. The small building envelope was further limited by water to the rear of the Property. The unique characteristics of the Property are clear when reviewing the survey. The Board is convinced that the exceptional practical difficulty was not created by the Applicants but was created by the lot's unique characteristics.
 - 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 variance will have no effect on the character of the neighborhood. The variance will allow the Applicants to replace an older dwelling with a newer home with a deck and stairs which should enhance the neighborhood. The deck and steps will project no farther than the prior dwelling while the dwelling will be located farther from the road than the prior dwelling and will comply with the previously issued variance approval. The new variance is only for the deck and stairs. Meanwhile, the Applicants have taken measures to alleviate concerns from neighbors. Notably, the Applicants proposed at least 7 parking spaces on their lot. The concerns raised by the opposition did not convince the Board that the variance would alter the essential character of the neighborhood. The Board notes that the neighboring property also has a reduced front yard setback and the Applicants' proposed deck and stairs will project no farther than the neighbor's front yard setback. Ultimately, the Board was not convinced that variance would somehow alter the essential character of the neighborhood or be detrimental to the public welfare.
 - 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 Applicants have demonstrated that the variance sought will allow the Applicants to construct a new deck and stairs on the Property. The deck and stairs will provide safe access to the home and the Board is convinced that the Applicants took measures to limit the front yard encroachments.
 - 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.
 - h. This approval is subject to the following conditions:
 - i. The variance shall be a fifteen (15) foot variance from the front yard setback requirement for the limited purpose of two (2) open, uncovered stairways not exceeding the first elevated floor level of the house and an open, uncovered deck not exceeding the first elevated floor level of the house and not exceeding thirty-three feet in width.
 - ii. When home construction occurs on the lot, improvements will include two (2) garages and five (5) off-street parking spaces.
 - iii. The existing structure with a non-conforming front yard setback of 8.5 feet will be demolished and removed from the lot.

- iv. The appeal of the Director's decision which was part of this Application shall be deemed moot and withdrawn by the Applicants.
- i. The Board also notes that the variance granted in Case No. 12291 for the dwelling remains in effect and that variance approval has been extended until June 18, 2022.

The Board granted the variance application with conditions 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 with conditions. The Board Members in favor were Dr. Kevin Carson, Mr. Jeffrey Chorman, Mr. Brent Workman, and Mr. John Williamson. Ms. Ellen Magee voted against the motion to approve Application with conditions.

BOARD OF ADJUSTMENT
OF SUSSEX COUNTY



John Williamson
Acting Chairman

If the use is not established within two (2) years from the date below the application becomes void.

Date January 4, 2021.