

BEFORE THE BOARD OF ADJUSTMENT OF SUSSEX COUNTY

IN RE: LOUIS J. CUCK & LUDOVIC BERTAUT

(Case No. 12508)

A hearing was held after due notice on December 21, 2020. The Board members present 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 side yard, front yard, and maximum fence height setback requirements for proposed structures.

Findings of Fact

The Board found that the Applicants are requesting the following variances: 1) a variance of 10 feet from the forty (40) feet front yard setback requirement from Hebron Road for a proposed swimming pool; 2) a variance of 10 feet from the forty (40) feet front yard setback requirement from Hebron Road for a proposed shed; and 3) a variance of 3.5 feet from the 3.5 foot height requirement from Hebron Road for a proposed fence. This application pertains to certain real property that is a through lot located on the northeast side of Dunbar Street and the southwest side of Hebron Road approximately 212 feet northwest of Norwood Street (911 Address: N/A); said property being identified as Sussex County Tax Map Parcel Number 3-34-13.15-1.01. After a public hearing, the Board made the following findings of fact:

1. The Board was given copies of the Application, a site plan of the Property dated December 3, 2020¹, portions of the Sussex County Zoning Code, renderings, photographs, letters in support of and in opposition to the Application, 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 two letters in support of the Application and three letters and a petition containing 32 signatures in opposition to the Application.
3. The Board found that Louis Cuck and Ludovic Bertaut were sworn in to give testimony about the Application.
4. The Board found that Mr. Cuck testified that the Property is a through lot with frontages on Dunbar Street and Hebron Road and that the front setback off Dunbar Street is 30 feet and the front setback off Hebron Road is 40 feet.
5. The Board found that Mr. Cuck testified that, within the community of 98 lots, 93 lots have only one front yard setback but five lots are through lots having two front yard setbacks.
6. The Board found that Mr. Cuck testified that the combined front and rear yard setbacks in the community range from 40 feet to 50 feet total but, for the five through lots it is 70 feet and that these setbacks disproportionately place limitations on the ability of these properties for comparable and equitable development.
7. The Board found that Mr. Cuck testified that the Property is not a perfect rectangle as it has two different lengths with the northeast side measuring 170.99 feet and the southwest side measuring 148.70 feet.
8. The Board found that Mr. Cuck testified that the lot is smaller than what zoning would require if a new lot was created.

¹ Based on the Applicants' testimony, the site plan incorrectly shows the width of the proposed dwelling. According to Mr. Cuck, no variances are needed for the dwelling or HVAC units.

9. The Board found that Mr. Cuck testified that, with 70 feet in setbacks, it is difficult to create a backyard with a pool and shed and the differing lengths of the lot increase that limitation.
10. The Board found that Mr. Cuck testified that, with the 70 feet in setbacks, there is no other location on the lot to place such structures that do not infringe on the back part of the proposed home.
11. The Board found that Mr. Cuck testified that the non-conforming lot was not created by the Applicant.
12. The Board found that Mr. Cuck testified that 83 of the 98 homes in the community are less than 10,000 square feet and automatically receive reduced setbacks.
13. The Board found that Mr. Cuck testified that building this proposed dwelling with accessory structures is not asking for anything greater than what already exists in the community.
14. The Board found that Mr. Cuck testified that building this home will increase the character of the neighborhood and will increase the value of the property that people already own in this community.
15. The Board found that Mr. Cuck testified that the intent is to build a retirement home and become a positive presence in the community.
16. The Board found that Mr. Cuck testified that the variances requested are the minimum variances because of the through lot.
17. The Board found that Mr. Cuck testified that there will only be single access to the lot from Dunbar Street and there will no access to Hebron Road.
18. The Board found that Mr. Cuck testified that a 10 foot rear yard is the standard for 93 of the 98 homes in the community.
19. The Board found that Mr. Cuck testified that the 7 foot fence is needed for the general safety and privacy of the property due to the heavy traffic, new bike path on Hebron Road, and pool.
20. The Board found that Mr. Cuck testified that the pool requires at least a 4 foot tall fence.
21. The Board found that Mr. Cuck testified that there is such space to the rear of the proposed dwelling they wish to use it as a back yard and not have the structures crowded together.
22. The Board found that Mr. Cuck testified that there is approximately 12 feet from the property line to the edge of paving for the bike path and that granting the variance for the fence would not create a visibility issue for traffic.
23. The Board found that Mr. Cuck testified that the Property is served by public sewer.
24. The Board found that Mr. Cuck testified that the fence will go to the rear of the lot and the Applicants did not look at moving the fence farther away from Hebron Road.
25. The Board found that Mr. Bertaut testified that there is 33 feet from the property line to the center of Hebron Road.
26. The Board found that Brian Ulishney and Douglas Lingenfelter sworn in to give testimony in support of the Application. Both men own nearby lots.
27. The Board found that Mr. Ulishney testified that the majority of lots are more typical standard rectangular shaped lots and variances would not be typically needed to make those lots most useful.
28. The Board found that Mr. Ulishney testified that there are 5 properties in the neighborhood that are different and that the through lot requirements limit the use by 30 feet or more than other properties.
29. The Board found that Mr. Ulishney testified that the Property is also denied access from frontage on Hebron Road and that treating Hebron Road as a front yard is a limitation because it is effectively the back yard of the Property.
30. The Board found that Mr. Ulishney testified that, due to the shape of the lot, the Applicants also lose approximately 20 feet.

31. The Board found that Mr. Ulishney testified that, given the limitations on this property, the request for variances seem reasonable and, if granted, do not provide the owners with anymore access than any other property in the development.
32. The Board found that Mr. Ulishney testified that, as property owner with similar setbacks, he was unaware of the through lot issue when he purchased the Property.
33. The Board found that Mr. Ulishney testified that the Property was previously overgrown and the Applicants have cleaned up the site.
34. The Board found that Mr. Ulishney testified that he supports the request as it is minimal, reasonable, and will not alter the character of the neighborhood.
35. The Board found that Mr. Lingenfelter testified that the through lot status was not disclosed to him during the purchase process.
36. The Board found that Mr. Lingenfelter testified that 10 feet is a reasonable request for a pool and a shed for what is effectively a back yard.
37. The Board found that Mr. Lingenfelter testified that the Junction & Breakwater Trail is being expanded and that the fence will provide privacy.
38. The Board found that Mr. Lingenfelter testified that he has not built on his lot but plans to do so in the future.
39. The Board found that Mr. Lingenfelter testified that, as the immediate adjacent property owner, he has no objection to the fence height and that there are similar 7 foot tall fences in the area.
40. The Board found that Brenda Milbourne, Trey Edwards, Stephanie Shelton, and Mary Ellen James were sworn in to give testimony in opposition to the Application.
41. The Board found that Ms. Milbourne testified that there is a resident living on Lot 4, which is one of the five through lots, and there was no variance needed for that property.
42. The Board found that Ms. Milbourne testified that West Rehoboth is a unique community and the community feels that the Applicants do not want to be part of the community.
43. The Board found that Ms. Milbourne testified that, if this variance is granted, it may create a precedent for future variances.
44. The Board found that Mr. Edwards testified that he is the secretary of Westside New Beginnings, LLC, in West Rehoboth and that the Board members of the Westside New Beginnings voted to oppose the request for a variance on the merit of property value.
45. The Board found that Mr. Edwards testified that the higher the property value will create hardship for the existing residents who are mostly low-income earners and senior citizens.
46. The Board found that Mr. Edwards testified that granting the variances will alter the character of the neighborhood by making it unaffordable for the current residents.
47. The Board found that Ms. Shelton testified that the Applicants knew they bought a small lot and they should build within the setbacks.
48. The Board found that Ms. Shelton testified that the fence will block her view of the road.
49. The Board found that Ms. James testified that she is opposed to variances in general except in extreme circumstances and that homes should be built within the confines of County Code without having to infringe upon neighbors.
50. The Board found that two persons appeared in support of the Application, two persons appeared in opposition to the Application, and two persons appeared via teleconference to oppose the Application.
51. 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 Applicants failed to prove that the structures could not be built in strict conformity with the Sussex County Zoning Code. The Property is a vacant lot and the Applicants have failed to convince the Board that the variances are necessary to construct a pool, shed, and fence on the lot in compliance with the Code. The Applicants propose to construct a 7 foot tall fence along the property line bordering Hebron Road and to place a pool and shed outside the building envelope. The lot is currently vacant and the Applicants are have designed a house which appears to provide adequate space to place a pool, shed, and privacy fence within the building envelope. The Applicants intend to construct the dwelling in compliance with the Code but have not convinced the Board that these others structures could not be built in compliance with the Code. Rather, the Applicants seek to construct structures which will violate the Zoning Code. Perhaps the pool, shed, and fence would not be located in the Applicants' desired location but the Applicants have simply failed to demonstrate by substantial evidence that these structures are necessary to reasonably use the Property and that, if they are necessary for the reasonable use of the Property, that they could not be located in compliance with the 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.
- b. The Board finds that the Applicants are creating their own exceptional practical difficulty by proposing to a construct a pool, shed, and fence which do not comply with the Sussex County Zoning Code. The Applicants' decision to construct these structures as proposed is the reason for the need for a variance. The lot is a vacant lot and the building envelope appears to otherwise be able to fit these structures without the need for these variances. The Board was not convinced that the variance requests were the product of a *need*. Instead, the variance requests appear to be the product of a *want* as the Applicants seek to build the pool, shed, and fence as proposed for purposes of convenience, profit, and / or caprice. Since the Applicants can develop the Property in compliance with the Sussex County Zoning Code, the need for the variance is something created by the Applicants' wants rather than an unusual physical condition relating to the Property. The Applicants have thus created their own exceptional practical difficulty.
- c. The Applicants have failed to demonstrate that the variances will not alter the essential character of the neighborhood or be detrimental to the public welfare or permanently impair the appropriate use and development of adjacent property. The Applicants propose to construct a large fence along the properly line adjacent to Hebron Road. The Applicants also propose to construct a fence and pool near that property line as well. These structures will be close to a well-traveled road. The Board is also concerned that the variances, if granted, would encourage neighboring properties to seek similar variances; particularly since there are 4 other similarly situated lots in the area. The Board also notes that, while the Applicants complained about the through lot requirements, those requirements are part of the Sussex County Zoning Code and have been in effect for many years. The Applicants knew or should have known about these limitations when acquiring the Property. Their proposal now runs contrary to the express requirements in the Sussex County Zoning Code and, if granted, would alter the character of the neighborhood. Furthermore, the Board notes that there was significant opposition to this Application and the opposition presented concerns that the proposed development of the Property would affect the

character of the neighborhood as well. Lastly, the Board has concerns about the impact of the proposed structures, particularly the fence, on the public welfare. The proposed fence along Hebron Road will be very close to the sidewalk and the bike lane along Hebron Road and could threaten the public welfare. The Applicants have failed to demonstrate by substantial evidence that the variances will not be detrimental to the public welfare.

- 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 variances are necessary to afford relief since there is space reasonably develop 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, and Mr. John Williamson. No Board Member voted against the Motion to deny the variance application. Mr. Brent Workman did not participate in the discussion or vote on this Application.

BOARD OF ADJUSTMENT
OF SUSSEX COUNTY



John Williamson
Chairman

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

Date March 1, 2021.