

BEFORE THE BOARD OF ADJUSTMENT OF SUSSEX COUNTY

IN RE: DEWEY BEER COMPANY

(Case No. 12520)

A hearing was held after due notice on February 1, 2021. The Board members present were: Dr. Kevin Carson, Mr. Jeff Chorman, Mr. John T. Hastings, Mr. John Williamson, and Mr. Brent Workman.

Nature of the Proceedings

This is an application for variances from the side yard setback requirements for proposed structures.

Findings of Fact

The Board found that the Applicant is requesting the following variances for proposed mechanical equipment serving a brewery / microbrewery: 1) three (3) variances of 3.4 feet from the 20 feet side yard setback requirement on the south side for proposed mechanical equipment on pads measuring 4 feet by 4 feet, 2) two (2) variances of 9.4 feet from the 20 feet side yard setback requirement on the south side for proposed mechanical equipment on 10 foot by 10 foot pads, 3) one (1) variance of 9.4 feet from the 20 feet side yard setback requirement on the south side for proposed mechanical equipment on a 10 foot by 20.5 foot pad, and 4) one (1) variance of 9.4 feet from the 20 feet side yard setback requirement on the south side for proposed mechanical equipment on a 10 foot by 12.5 foot pad. This property located on the southeast side of Iron Throne Drive off Harbeson Road (Route 5) approximately 0.20 miles north of Lewes Georgetown Highway (Route 9) (911 Address: 21241 Iron Throne Drive, Milton) said property being identified as Sussex County Tax Map Parcel Number 235-30.00-21.00. After a public hearing, the Board made the following findings of fact:

1. The Board was given copies of the Application, a memo from the Planning & Zoning department dated July 2, 2020 regarding CU #2210, a final location survey dated September 22, 2020, a record plan dated March 19, 2018, an independent contractor agreement dated January 21, 2021, photographs, a drawing of the proposed fit-out, Ordinance No. 2729, letters regarding 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 no correspondence in support of and two letters in opposition to the Application.
3. The Board found that Michael Reilly was sworn in to testify about the Application. Fred Townsend, Esquire, presented the Application on behalf of the Applicant
4. The Board found that Mr. Townsend stated that the Property is located in a business park and are seven buildings in this business park. The building which is the subject of this Application runs along the southern side of the Property.
5. The Board found that Mr. Townsend stated that Dewey Beer Company owns a brew pub in Dewey Beach where they act as a restaurant and produce beer onsite.
6. The Board found that Mr. Townsend stated that the Applicant is considerate to their neighbors and avoid complaints.
7. The Board found that Mr. Townsend stated that a microbrewery is a state licensed facility which differs from a brew pub as there is no onsite food production.
8. The Board found that Mr. Townsend stated that a microbrewery does not act as a restaurant and is limited in the amount of beer it can produce; though a microbrewery does offer a tasting room which is a small percentage of the total facility.
9. The Board found that Mr. Townsend stated that the microbrewery is also limited in the hours of operation and has been fully approved by Sussex County Council.

10. The Board found that Mr. Townsend stated that the use and fit out of this building has been delayed six months due to Covid related delays.
11. The Board found that Mr. Townsend stated that the building was allowed to be constructed because the building meets the setback requirements. The mechanical equipment needed for the microbrewery, however, will not meet the setback requirements. The variances are, thus requested, to allow for the mechanicals and other facilities that relate to beer production.
12. The Board found that Mr. Townsend stated that Dewey Beer company will offer accommodations to protect the interests of the neighbor to the south.
13. The Board found that Mr. Townsend stated that the need for the variance was caused by the fact that there were two different sets of engineers on this project and that one engineer designed the building and another engineer designed the fit-out. According to Mr. Townsend, the fit-out was not considered when the building was designed and the building is just 20.6 ft. from the property line thereby leaving an insufficient area for the mechanical equipment.
14. The Board found that Mr. Townsend stated that the Property is unique because the building is already in place and the Applicant has to work with that location.
15. The Board found that Mr. Townsend stated that the Property cannot otherwise be developed as it is absolutely necessary to place the HVAC and the other mechanicals for the operation of the microbrewery.
16. The Board found that Mr. Townsend stated that the mechanical equipment cannot be placed behind the building as there is only an 11 foot separation distance to the building to the east and the mechanicals cannot be located in the front of the building or in the parking area as the parking is shared with other businesses in the park.
17. The Board found that Mr. Townsend stated that the owners of Dewey Beer Company did not realize that placing the mechanicals on the south side of the building would create the need for a variance.
18. The Board found that Mr. Townsend stated that this building is located in a General Commercial (C-1) district in a business park.
19. The Board found that Mr. Townsend stated that there are residential properties to the rear of the business park and to the south of the subject property.
20. The Board found that Mr. Townsend stated that the Applicants will place a 6 foot tall privacy fence to create both a visual and sound barrier along the property line to the south.
21. The Board found that Mr. Townsend stated that there is a large shed on the property to the south which runs along the boundary line and creates a significant buffer as well.
22. The Board found that Mr. Townsend stated that the Applicant considered plantings but the fence will serve as a better buffer.
23. The Board found that Mr. Reilly testified that he is the Head of Operations for Dewey Beer Company and that he is a former physics teacher.
24. The Board found that Mr. Reilly testified that he was tasked with setting up the brewery including the mechanicals which are the subject of the Application.
25. The Board found that Mr. Reilly testified that there are four HVAC units that are designed for both the building and production of beer.
26. The Board found that Mr. Reilly testified that, when looking at the Property along the southerly boundary from west to east, there are 5 pads.
27. The Board found that Mr. Reilly testified that the first pad will be used for the HVAC unit for the 1,800 square foot tasting room, the second pad will be used for the HVAC unit for the brewery because it is hot and humid in the brewery, the third pad will be used for a Glycol chiller and HVAC unit, the fourth pad will have 2 HVAC units for a walk-in cooler, and the fifth pad will be used for a collection vessel for yeast and hop byproduct.

28. The Board found that Mr. Reilly testified that the holding tank will measure 12 feet tall and that Clean Delaware will collect the wastewater from the holding tank twice monthly via hose and the wastewater will be sprayed onto fields.
29. The Board found that Mr. Reilly testified that the waste grain that will be collected by a farmer and used as feed for animals. He noted that this is a fertilizer by-product and does not contain any toxic products or chemicals.
30. The Board found that Mr. Reilly testified that the Glycol chiller, which is 7 feet tall, is the most important equipment for the brewery and will hold 300 gallons of liquid.
31. The Board found that Mr. Reilly testified that the proposed fence will go across the front from the building to the side property line and run along the side property line for the length of the building. He believes that the fence will hide 90% of the mechanical equipment and will provide a visual and noise buffer.
32. The Board found that Mr. Reilly testified that he has also reached out to a landscaping company regarding planting trees of 8 – 10 feet tall.
33. The Board found that Mr. Reilly testified that the variances are an absolute necessity.
34. The Board found that Mr. Reilly testified that the structures cannot be placed inside because they need to breathe and that the Applicant cannot place the structures in the parking lot because the lot is needed for other tenants in the business park.
35. The Board found that Mr. Reilly testified that the retention pond also creates a problem.
36. The Board found that Mr. Reilly testified that the holding tank will capture 10% of wastewater.
37. The Board found that Mr. Reilly testified that the patio will be located in the front yard closer to Route 5.
38. The Board found that Mr. Reilly testified that there will be no driveway between the mechanical equipment and the fence.
39. The Board found that Mr. Reilly testified that the neighboring house will be closer to the patio than the mechanical equipment.
40. The Board found that Mr. Reilly testified that the neighbor's shed also provides a barrier for the equipment.
41. The Board found that Mr. Reilly testified that the tank pad will measure 10 feet by 10 feet.
42. The Board found that Mr. Reilly testified that there is 60 feet from the corner of the neighbor's house to the first HVAC unit.
43. The Board found that Mr. Reilly testified that there is 200 feet from the corner of the neighbor's house to the holding tank.
44. The Board found that Mr. Reilly testified that the stormwater area is located behind Building 4.
45. The Board found that Mr. Reilly testified that the HVAC units are 4 feet tall.
46. The Board found that Mr. Reilly testified that noise from the equipment will be like noise from a loud fan.
47. The Board found that Mr. Reilly testified that the Applicant has similar equipment at its Dewey Beach location and it is adjacent to residential properties. According to Mr. Reilly, the Applicant has received no complaints about that equipment.
48. The Board found that Mr. Reilly testified that the Applicant proposes, as a condition of approval, that a fence be installed along the south property line.
49. The Board found that Mr. Reilly affirmed the statements made by Mr. Townsend as true and correct.
50. The Board found that Mr. Townsend stated that the HVAC units must be located outside.
51. The Board found that Mr. Townsend stated that the neighbor to the south also has a fence along the shared property line and the shed on the neighboring lot is approximately 60 feet long and blocks much of the building.

52. The Board found that Mr. Townsend stated that the residential property to the south is currently vacant.
53. The Board found that Mr. Townsend stated that, because the neighboring lot is residential and not commercial, the side yard setbacks are increased from 5 feet to 20 feet.
54. The Board found that Mr. Townsend stated that the property owner has agreed to the installation of a fence along the property line.
55. The Board found that Mr. Townsend stated that the tank can be located close to flush with the building.
56. The Board found that Mr. Townsend stated that the site plan process was halted due to the need for a variance.
57. The Board found that Mr. Townsend stated that the survey dated September 22, 2020, with the note about the 9 feet x 9 feet pad, is the correct survey to use but the pad is actually 10 feet by 10 feet.
58. The Board found that Mr. Ronald Tonge was sworn in to give testimony in opposition to the Application.
59. The Board found that Mr. Tonge testified that he is the nephew of Shirley Givens, who is the owner of the adjacent property to the south.
60. The Board found that Mr. Tonge testified that the land is flat with the exception of a wooded area in the rear of the Property.
61. The Board found that Mr. Tonge testified that, when the site plan for the subject property was provided in 2017, it was for a quiet business park with minimal impact on surrounding neighbors.
62. The Board found that Mr. Tonge testified that, when the conditional use was approved, the finding of fact stated that the "Brewing operations will not have an adverse effect on the neighboring properties or the community. The applicants have stated that all the brewery operations will occur within the building, and there are not any sounds or smells that will come from the building during these operations". He believes that these findings of fact may no longer be true based on the request to place the HVAC and other equipment to be placed in the side yard setback adjacent to Ms. Givens' property will introduce substantial sounds and noise to the area.
63. The Board found that Mr. Tonge testified that Ms. Givens also has concerns about the proximity of the large propane tanks to her property and how will they be accessed for filling.
64. The Board found that Mr. Tonge testified that the building is not the issue but the loud HVAC equipment that will turn a quiet business park into a loud industrial area and will change the essential character of the neighborhood and Ms. Givens' property.
65. The Board found that Mr. Tonge testified that a 6 foot tall vinyl fence will not be a remedy for equipment that is taller than the proposed fence and will not mask the noise from the mechanical equipment.
66. The Board found that Mr. Tonge testified that a noise study should be completed at the Applicant's expense to show the effect on the neighborhood.
67. The Board found that Mr. Tonge testified that the Applicant has created a hardship for themselves of their own making and should not come at the expense of the value of Ms. Givens' property.
68. The Board found that no one appeared in support of and one by teleconference in opposition to the Application.
69. The Board found that Mr. Townsend stated that the propane tanks are not permanent and could be moved from the current location.
70. The Board found that Mr. Townsend stated that the land is flat on the Property and this was an error by him on the Application.

71. The Board found that Mr. Townsend stated that the adjacent property is a large parcel with the house up front and there is a quite a bit of distance between the home and the mechanical equipment on the subject property.
72. The Board found that Mr. Townsend stated that it could be a condition of approval that the fence be the maximum fence height allowed by Sussex County Code.
73. The Board left the record open for the limited purpose of allowing the Applicant to submit a landscape and fence plan. This plan was received and the Board discussed and voted on the Application on March 1, 2021.
74. 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, with conditions, for the variance met the standards for granting a variance. The findings below further support the Board's decision to approve the Application for the variance.
 - a. The Property is unique due to its size, shape, and development. The Applicant is a tenant of a newly constructed building in a commercial business park. The Applicant operates a microbrewery and, as part of its operation, the Applicant needs certain equipment which cannot be located inside. The park is developed with other buildings, parking areas, and stormwater ponds which limit where those mechanicals can be placed. As such, the area where the mechanicals can be placed is exceptionally limited. Ultimately, these unique characteristics of this Property have created a limited building envelope and have created an unnecessary hardship and exceptional practical difficulty for the Applicant who seeks to place certain mechanical equipment on the site.
 - 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 unique physical characteristics and the buildable area thereof is limited due to those characteristics. The Applicant seeks to place certain mechanical equipment on the lot but is unable to do so without violating the Sussex County Zoning Code. The Board is convinced that the variances are necessary to enable the reasonable use of the Property as the variances will allow these reasonably sized structures to be placed the lot. The Board is convinced that the shape and location of the structures are also reasonable, which is confirmed when reviewing the survey provided by the Applicant. The Board notes that this equipment is necessary for the Applicant to operate the microbrewery.
 - d. The unnecessary hardship and exceptional practical difficulty were not created by the Applicant. As previously stated, the Property has unique conditions and these conditions have resulted in a limited building envelope on the Property. These conditions have created the unnecessary hardship and exceptional practical difficulty. Furthermore, the Applicant is constrained by the location of the existing building and other structures, parking, and stormwater on the lot which also present challenges on where the mechanical equipment can be located.
 - 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 mechanical equipment, with the conditions hereafter imposed, will have no effect on the character of the neighborhood. The mechanical equipment will be separated from neighboring property by a large fence and landscaping, which will provide a noise and visual barrier. While a neighbor objected to the request, the Board notes that the

conditions imposed should address or alleviate the neighbor's concerns. Moreover, the area where the mechanical equipment is located is further buffered by a garage on the neighboring property. The Board was not convinced that the placement of the mechanical equipment, with the imposed conditions, would somehow alter the essential character of the neighborhood.

- f. The variances sought are the minimum variances necessary to afford relief and the variances requested represent the least modifications possible of the regulation at issue. The Applicant has demonstrated that the variances sought will allow the Applicants to place reasonably sized mechanical equipment on the Property and that such equipment is necessary for the Applicant to operate its microbrewery. The Board is convinced that the Applicant explored other options for the size, shape, and location of that equipment but was constrained by the conditions of the lot.
- 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. The Board's approval is subject to the following conditions:
 - i. A fence must be installed along the south side of the Property no more than 14 feet from the Applicant's building and the fence must be enclosed on the sides.
 - ii. The fence must be made of a vinyl construction and be 7 feet tall.
 - iii. As proffered by the Applicant, the Applicant must install landscaping along the southern property line in a manner consistent with the plan dated February 22, 2021.

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 of the Motion to approve the variance with conditions were Mr. Jeffrey Chorman, Mr. Travis Hastings, Mr. John Williamson, and Mr. Brent Workman. Dr. Kevin Carson voted against the Motion to approve the variance application with conditions.

BOARD OF ADJUSTMENT
OF SUSSEX COUNTY



John Williamson
Chair

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

Date May 3, 2021.