

BEFORE THE BOARD OF ADJUSTMENT OF SUSSEX COUNTY

IN RE: KEY PROPERTIES GROUP, LLC

(ELMER G. FANNIN)

(Case No. 12557)

A public hearing was held after due notice on May 17, 2021. The Board members present were: Dr. Kevin Carson, Mr. Jeff Chorman, Mr. Jordan Warfel, and Mr. John Williamson.

Nature of the Proceedings

This is an application for variances from the front yard setback requirements and the landscape buffer requirement in the Combined Highway Corridor Overlay Zone (CHCOZ) for existing and proposed structures.

Findings of Fact

The Board found that the Applicant is requesting the following variances: 1) a variance of 27.3 feet from the sixty (60) feet front yard setback requirement for the original building on Parcel 75.00; 2) a variance of 31.28 feet from the sixty (60) feet front yard setback requirement for a proposed front entry on a smaller existing building on Parcel 74.00; 3) a variance of 27.28 feet from the sixty (60) feet front yard setback requirement for an existing building on Parcel 74.00; 4) a variance of 26.29 feet from the sixty (60) feet front yard setback requirement for a proposed addition to the building on Parcel 74.00; and 5) a variance of 5 feet from the twenty (20) feet landscape buffer requirement in the Combined Highway Corridor Overlay Zone for Parcels 74.00 and 75.00. This application pertains to certain real located on the northeast side of Coastal Highway (Route 1) approximately 546 feet southeast of Kings Highway (911 Address: 18315, 18321, 18327 Coastal Highway and 34670, 34673, 34677, 34682, 34703, 34704 Villa Circle, Lewes); said property being identified as Sussex County Tax Map Parcel Number 334-6.00-74.00, 75.00 & 70.01 (Portion of). 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 survey of the Property dated March 10, 2021, findings of fact for Case No. 11883, a site plan dated April 20, 2021, a Power Point presentation, a restaurant development site plan dated October 24, 2016, a letter in opposition to the Application, 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 one letter in opposition to the Application.
3. The Board found that Mark Davidson, who is an engineer with Merestone Consultants, was sworn in to give testimony about the Application. Mr. Davidson submitted a lease-option agreement to the Board to review.
4. The Board found that Mr. Davidson testified that the properties are located on the northeast side of Coastal Highway just south of Kings Highway outside of Lewes and the properties are zoned General Commercial (C-1).
5. The Board found that Mr. Davidson testified that the properties are broken up into the following three parcels: 1) Parcel 74 which consists of approximately 0.33 acres with 125 feet of frontage along Coastal Highway and is 116.5 feet deep, 2) Parcel 75 which consists of approximately 0.55 acres with 105 feet of frontage along Coastal Highway and is 160 feet deep and wraps around the rear of Parcel 74, and the total length of the rear of the lot is approximately 230 feet, and 3) a portion of Parcel 70.01

- which is owned by the Villas at Bay Crossing. According to Mr. Davidson, the Applicant intends to combine all three parcels into one property.
6. The Board found that Mr. Davidson testified that the Applicant is proposing to renovate and use the existing buildings on both properties as restaurants.
 7. The Board found that Mr. Davidson testified that the Applicant has a lease with the option to purchase a portion of Parcel 70.01 (which consists of approximately 0.3 acres) to use as parking for the restaurants.
 8. The Board found that Mr. Davidson testified that the Villas at Bay Crossing Condominium Association has excess parking spaces and has agreed to lease this portion of their property (Parcel 70.01) to the Applicant.
 9. The Board found that Mr. Davidson testified that this property was the subject of a previous Board application, which was heard in November 2016 for similar requests involving the larger building on Parcel 75 and a plan to demolish the smaller building on Parcel 74. He noted that the demolition of the smaller building, as proposed on the prior application, was to accommodate for parking for the larger building but the lease with Villas at Bay Crossing now provides that additional parking.
 10. The Board found that Mr. Davidson testified that the prior variance approval expired.
 11. The Board found that Mr. Davidson testified that the Applicant applied for and received permits for the improvements to both buildings and that construction has begun at the site.
 12. The Board found that Mr. Davidson testified that the Applicant is proposing to use the larger building for an Italian restaurant where the main restaurant will be used for dining and the smaller building would be used for a happy hour style restaurant with outdoor seating. He noted that food would be prepared in the larger building.
 13. The Board found that Mr. Davidson testified that the buildings will need similar front yard setback variances.
 14. The Board found that Mr. Davidson testified that the unique condition of this site is that the building is existing and was constructed in 1948 and predates Sussex County Zoning Code and the adoption of the CHCOZ.
 15. The Board found that Mr. Davidson testified that the buildings were previously residences but that single-family dwellings have diminished along the Coastal Highway corridor given the nature of the area, uses, traffic, and zoning of properties.
 16. The Board found that Mr. Davidson testified that the building on Parcel 75 was used as an office in the 1990s.
 17. The Board found that Mr. Davidson testified that the parcels are small and have relatively shallow depths.
 18. The Board found that Mr. Davidson testified that the lots will be subject to parking, loading, and stormwater management requirements.
 19. The Board found that Mr. Davidson testified that the properties are unique due to the shallowness of the lots, the connection of portion of Parcel 70.01 for parking, and the dedication of 15 feet to DeIDOT for a permanent easement, and that these conditions create limited space for handling additional drainage and utility placement for the reuse and redevelopment of the existing buildings.
 20. The Board found that Mr. Davidson testified that, because of the physical circumstances or conditions, there is no possibility that the Property can be developed in strict conformity with the provisions of the Zoning Ordinance because approximately 28 feet of the building would have to be demolished in order to bring it into conformity.
 21. The Board found that Mr. Davidson testified that, in order to provide sufficient parking, additional drainage, and utilities, the 5 foot variance from the CHCOZ is necessary.
 22. The Board found that Mr. Davidson testified that the Applicant meets DeIDOT requirements regarding landscaping within the easement area.

23. The Board found that Mr. Davidson testified that the variances are necessary to enable the reasonable use of the Property.
24. The Board found that Mr. Davidson testified that the buildings were on the lots when the Applicant purchased the Property.
25. The Board found that Mr. Davidson testified that the Applicant wants to use both buildings as restaurants, which are permitted uses in the C-1 zoning district.
26. The Board found that Mr. Davidson testified that the requested variances will not alter the essential character of the neighborhood as the subject properties were granted variances for the front yard setback and from the CHCOZ buffer on November 21, 2017 (Case No. 11883).
27. The Board found that Mr. Davidson testified that the building has received site plan approval by the Sussex County Planning & Zoning Commission for the proposed restaurant use.
28. The Board found that Mr. Davidson testified that there are houses that have been converted into commercial uses in the immediate area.
29. The Board found that Mr. Davidson testified that these are the minimum variances needed for the front yard setback for the existing buildings.
30. The Board found that Mr. Davidson testified that a 5 foot variance from the CHCOZ is the minimum necessary to provide the required landscaping that will preserve and enhance the aesthetic character of the proposed restaurants along Coastal Highway.
31. The Board found that Mr. Davidson testified that there are 107 parking spaces required by Code and 79 parking spaces being provided (which includes the spaces on Parcel 70.01). He noted that the Applicant can request a reduction in parking from the Planning and Zoning Commission.
32. The Board found that Mr. Davidson testified that the concept is that patrons can use Uber and public transportation to get to the restaurant.
33. The Board found that Mr. Davidson testified that there will be one kitchen to serve both buildings but there will not be much food service in the smaller building as it will not have a large kitchen. According to Mr. Davidson, the Applicant does not foresee wait staff traveling between the two buildings. He anticipates that outdoor seating will be seasonal.
34. The Board found that Mr. Davidson testified that, to the south, there is a professional office building and, to the north, there is Lazy Susan's restaurant and some offices.
35. The Board found that Mr. Davidson testified that the smaller building is proposed to be retained since the Applicant has secured parking on an adjacent lot. This proposal differs from the prior application approved in 2017.
36. The Board found that Mr. Gary Janoske was sworn in to give testimony in opposition to the Application.
37. The Board found that Mr. Janoske testified that he lives on adjacent property and that he and several other nearby property owners oppose the Application.
38. The Board found that Mr. Janoske testified that, if any owner in the Villas at Bay Crossing objects to the sale as part of Parcel 70.01, then it cannot be sold.
39. The Board found that Mr. Janoske testified, had he had the opportunity in 2016, he would have opposed the original request for a variance.
40. The Board found that Mr. Janoske testified he is opposed because setbacks are for the common good of the public, safety, and aesthetics and he believes the Applicant's proposal will take away from the neighborhood.
41. The Board found that Mr. Janoske testified he is opposed to the outdoor dining.
42. The Board found that Mr. Janoske testified he has concerns that patrons for the restaurant would be driving through the development at Villas of Bay Crossing.
43. The Board found that Mr. Davidson testified that the lease can continue yearly until the sale can be completed.

44. The Board found that Mr. Davidson testified that the parking spaces on Parcel 70.01 will be connected to Parcels 74 and 75 and that patrons would not have to drive through the Villas of Bay Crossing to access the parking.
45. The Board tabled the Application until June 7, 2021, at which time the Board discussed and voted on 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 the application for the variances for the building on Parcel 75.00 and the Combined Highway Corridor Overlay Zone met the standards for granting a variance but that the variances for the building on Parcel 74.00 failed to meet the standards for granting a variance. The findings below further support the Board's decision to approve the Application in part and to deny the Application in part.
 - a. The Applicant is the owner of two parcels (Parcel 74.00 and Parcel 75.00) which have been developed with buildings prior to the enactment of the Sussex County Zoning Code. The Applicant seeks to renovate and expand those buildings and to repurpose the buildings as restaurants. In doing so, the Applicant proposes to combine those parcels into one lot. The Applicant also has a purported lease agreement with the owner of Parcel 70.01 to use a portion of that lot for parking related to the restaurants.
 - b. The Board previously granted a variance in 2016 for similar variances for renovations to the building on Parcel 75.00. At that time, the Applicant presented that the building on Parcel 74.00 would be demolished and the space for the building on Parcel 74.00 would be used for parking. The Applicant, however, did not establish the use within one year of that approval and the Board's previous approval expired; a point which the Applicant readily acknowledges.
 - c. The proposal before the Board in this Application is separate and distinct from the Applicant's prior application as it results in additional land area of Parcel 74.00 and 75.00 being developed with restaurants, outdoor seating, and related improvements such as parking and loading areas. The Applicant presented a purported lease option agreement ("the Lease") with the owner of Parcel 70.01 which would allow the Applicant to use the parking spaces on Parcel 70.01.
 - d. The Lease is unusual as it recognizes that the Applicant would need to obtain unanimous consent of the owners in the Villas at Bay Crossing in order to purchase the leased portion of Parcel 70.01. As such, the initial term of the Lease is for only five (5) years but the Lease contains a clause that the Lease "shall continue thereafter until the property has been legally removed from the condominium and sold to Tenant." The Board questions the legality of this clause as it appears to violate the rules against perpetuities since there is no set date when the Applicant is required to purchase the leased area or when the Applicant's right to purchase expires. Moreover, opposition testified that unanimous consent to the sale was not available at this point. While the Applicant does not seek variances for Parcel 70.01, the Applicant has clearly designed Parcels 74.00 and 75.00 based on the assumption that the Applicant has rights to use Parcel 70.01. The Board notes that the Board's prior approval in 2016 was based on the Applicant's then-representation that the building on Parcel 74.00 would be removed because parking would be needed for the renovated building on Parcel 75.00. Now the Applicant has based its current design plan on shifting that parking to Parcel 70.01 through this unusual lease agreement. The Board has concerns about this shift in parking due to the uncertainty and questionable legality of the Lease. If all of the variances were granted, the Applicant could build two restaurants and

hope that there would be no issues with the Lease. The Board also has concerns that the renovation of both buildings and the proposed use of both buildings will increase the need for parking as opposed to simply improving one of the buildings for a restaurant. In essence, the Applicant's proposal overdevelops the Property. The Board further notes that the Applicant's engineer testified that the proposed parking (including the parking on Parcel 70.01) falls well short of the County's parking regulations. Notably, a significant amount of the total proposed parking will be located on Parcel 70.01.

- e. That being said, the Board found that the variances for the building on Parcel 75.00 met the standards for granting a variance provided that the structures of Parcel 74.00 are removed. This decision is in line with the Board's previous decision on an application for similar relief for that building granted on February 6, 2017. The Board also grants variances from the Combined Highway Corridor Overlay Zone. The Board, however, denies the variances for the Building on Parcel 74.00.
- f. Since Parcels 74.00 and 75.00 are proposed to be combined into one parcel, the Board simply refers to those to parcels collectively hereafter as "the Property."
- g. The Property is unique because it is an oddly shaped commercial property in the Combined Highway Corridor Overlay Zone. The Property is wide but shallow and the shallowness of the Property has posed a particular challenge for the Applicant, who seeks to redevelop the Property. The Applicant seeks to renovate and expand the existing building on Parcel 75.00 for use as a restaurant, which is a permitted use. The shallowness of the Property has created an exceptional practical difficulty and unnecessary hardship for the Applicant because the Property is not deep enough to accommodate the parking and drive aisles necessary for the proposed restaurant. Similarly, the unique conditions of the Property have posed a challenge for the Applicant who seeks to retain the existing building on Parcel 75.00 in its location while expanding within the rear yard setback area. The building encroaches into the front yard setback and will not farther encroach into the setback area as part of this development. Undisputed testimony also indicates that, over the years, DeIDOT has taken additional right-of-way areas in the front yard, thereby reducing the size of the front yard as well. The Board finds that the unique physical conditions of the Property have created an unnecessary hardship and exceptional practical difficulty for the Applicant who seeks to redevelop the Property.
- h. The unnecessary hardship and exceptional practical difficulty are not being created by the provisions of the Sussex County Zoning Code.
- i. 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 Property has unique conditions and the buildable area thereof is limited due to these conditions. The building on Parcel 75.00 was placed on the lot many years ago prior to the enactment of the Sussex County Zoning Code. The Applicant seeks to redevelop the Property by expanding that building within the building envelope for use as a restaurant. The building, however, already encroaches into the setback area and due, the unique conditions of the Property, the Applicant cannot meet the buffer zone requirements. The Board is convinced that the variances related to the development of Parcel 75.00 are necessary to enable reasonable use thereof as it will allow the Applicant to redevelop the entire Property into a restaurant and parking area. The Board is convinced that the size and shape of the restaurant on Parcel 75.00 are reasonable, which is confirmed when reviewing the survey

provided by the Applicant (provided, however, that the building on Parcel 74.00 be removed). That being said, the Board is not convinced that retaining both structures on the Property is necessary to enable reasonable use of the Property. The lots are being combined and the proposed renovation and expansion of the building on Parcel 75.00 alone will provide the Applicant with reasonable use of the Property. Space on Parcel 74.00 will be needed for uses related to the restaurant such as parking. The Applicant, however, seeks to retain 2 buildings on the Property rather than remove one structure (as was originally proposed in 2016). The Board was not convinced that the retention and expansion of the building Parcel 74.00 is necessary for the Applicant to reasonably use the Property. Rather, the variances for the building on Parcel 75.00 and the Combined Highway Corridor Overlay Zone are necessary to enable reasonable use of the Property; albeit perhaps not the Applicant's preferred use of the Property.

- j. As it pertains to the building on Parcel 75.00, the exceptional practical difficulty and unnecessary hardship were not created by the Applicant. The Applicant did not place the existing building on Parcel 75.00. Rather, that building has been on the Property for many years and its location predates the enactment of the Combined Highway Corridor Overlay Zone ordinance. The Applicant also did not create the odd depth of the Property, which has created a small building envelope. This small building envelope was further limited by DeIDOT takings for additional right-of-way space along Route 1. These conditions have limited where the Applicant can place parking and drive aisles for the proposed restaurant on the Property.
- k. That being said, the Board finds that, by attempting to develop the Property with two buildings, the Applicant has exacerbated and created an exceptional practical difficulty. The Applicant will be combining Parcels 74.00 and 75.00 into one lot yet wants to keep and expand both buildings. The Board finds this proposal to be excessive. The Board was not convinced that the variance requests for both buildings were the product of a *need*. Instead, those variance requests appear to be the product of a *want* as the Applicant seeks to renovate and expand both buildings as proposed for purposes of convenience, profit, and / or caprice. In this respect, the Applicant has thus created its own exceptional practical difficulty by proposing to renovate and expand both buildings.
- l. In light of the above, provided that the Applicant removes the building on Parcel 74.00, the Board believes that the Applicant can satisfy that the overall Property is unique and that those unique conditions have created an exceptional practical difficulty and unnecessary hardship which allows for the retention and expansion of the building on Parcel 75.00 as proposed.
- m. Provided that the building on Parcel 74.00 is removed, the variances related to the building on Parcel 75.00 and the Combined Highway Corridor Overlay Zone 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 for the structure on Parcel 75.00 will have no effect on the character of the neighborhood. The building has been on the Property for many years and the structure will encroach no farther into the front yard setback area than it currently does. This finding, of course, assumes that the building on Parcel 74.00 will be removed. A neighbor expressed concern about the impact of parking if both buildings were renovated and expanded as proposed and the Board shares that concern since the Applicant is not an owner of Parcel 70.01 and the overall development of the Property hinges on being able to use a portion of Parcel

70.01 for parking indefinitely. Without the parking on Parcel 70.01, the Property would be woefully short of meeting the County's parking requirements and, even with the parking on Parcel 70.01, the Applicant will still fall short of meeting the County's parking requirements. If, however, the building on Parcel 74.00 is removed, additional space for parking will be available and it would also reduce the need for parking because there will only be one building used for patrons rather than two buildings. Such development would also be consistent with what was proposed in 2016 by the Applicant. Regarding the buffer zone requirements, the Board finds that the encroachment into the buffer zone will not alter the character of the neighborhood as the Applicant proposes to add additional landscaping to that area which should improve the Property.

- n. The variances sought related to the building on Parcel 75.00 and the Combined Highway Corridor Overlay Zone are the minimum variances necessary to afford relief and the variances requested for Parcel 75.00 and the Combined Highway Corridor Overlay Zone requirements represent the least modifications possible of the regulations at issue. The Applicant has demonstrated that those variances will allow the Applicant to reasonably renovate and expand the existing building on Parcel 75.00 for use as a restaurant. The expansion will be within the building envelope as well. Notably, the building will encroach no farther into the setback area than the existing building and the Applicant will plant landscaping in the buffer zone. The Board notes, however, that the variances sought for Parcel 74.00 do not represent the minimum variances to afford relief. As previously discussed, if the Property is developed as proposed, the Property will be improved by two restaurants, which are larger than the current buildings existing on the site. This development would result in significantly reduced parking even though the use has intensified for the Property and effectively would overdevelop the Property. The renovation and expansion of the building on Parcel 75.00 combined with the removal of the building on Parcel 74.00, however, allows the Applicant to reasonably develop the Property while minimizing the need for variances. The Board notes that the Applicant previously made this request and demonstrated that such a development could work. The Board is not inclined to permit additional encroachments into the setback area when the Applicant has previously shown that it can reasonably develop the Property with fewer encroachments.
- o. 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 for the variances related to the building on Parcel 75.00 and the buffer zone requirements but denied the variances related to the building on Parcel 74.00.

Decision of the Board

Upon motion duly made and seconded, the variance application was approved in part and denied in part. The Board Members in favor of the motion were Dr. Kevin Carson, Mr. Jeffrey Chorman, Mr. Jordan Warfel, Mr. John Williamson. No Board Member voted against the motion to approve the Application in part and to deny the Application in part. Mr. Travis Hastings did not participate in the discussion or vote on this Application.

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 August 16, 2021