

BEFORE THE BOARD OF ADJUSTMENT OF SUSSEX COUNTY

IN RE: MICHAEL KELLY

(Case No. 12565)

A hearing was held after due notice on June 7, 2021. The Board members present were: Mr. Jeff Chorman, Mr. John T. Hastings, Mr. Jordan Warfel, and Mr. John Williamson.

Nature of the Proceedings

This is an application for variances from the corner front yard setback requirement for proposed structures.

Findings of Fact

The Board found that the Applicant is seeking a variance of 3.5 feet from the fifteen (15) feet corner front yard setback requirement for a proposed deck expansion, a variance of 3.9 feet from the fifteen (15) feet corner front yard setback requirement for a proposed deck expansion, and a variance of 12.1 feet from the fifteen (15) feet corner front yard setback requirement for a proposed accessory structure. This application pertains to certain real property located on the east side of Wilson Avenue within Cape Windsor Subdivision (911 Address: 38765 Wilson Avenue, Selbyville); said property being identified as Sussex County Tax Map Parcel Number 5-33-20.14-70.00. 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 survey of the Property dated April 23, 2021, a survey of the Property dated February 5, 2018, photographs, a survey of the Property dated August 3, 2005, photographs, 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 Michael Kelly was sworn in to give testimony about the Application.
4. The Board found that Mr. Kelly testified that the open existing deck, which was built in 2017, encroaches approximately 2 feet into the setback.
5. The Board found that Mr. Kelly testified that, when the deck was built, the side yard setback was 10 feet and it is now 5 feet.
6. The Board found that Mr. Kelly testified that the house was built to the 10 foot setback restriction.
7. The Board found that Mr. Kelly testified that he wishes to enlarge the deck and convert it to a sunroom.
8. The Board found that Mr. Kelly testified that the proposed structure would include an extension measuring 4 feet by 12 feet as shown on the survey dated April 23, 2021, as the area with the deck and shaded area.
9. The Board found that Mr. Kelly testified that the steps will comply with the setback requirements.
10. The Board found that Mr. Kelly testified that the Property is unique as it is on Old Lighthouse Road on one front and Wilson Avenue on another side.
11. The Board found that Mr. Kelly testified that there was confusion regarding the setbacks even for the Planning and Zoning Office. The Planning & Zoning Director determined that a corner front yard setback applies to the portion of the Property adjacent to Lincoln Drive and Old Lighthouse Road.

12. The Board found that Mr. Kelly testified that he also seeks a variance for a garage to the rear of the lot and the garage will consist of less than 600 square feet and will measure 20 feet by 24 feet.
13. The Board found that Mr. Kelly testified that the rear of the Property is approximately 30 feet wide making it difficult for any building to fit there and that the garage would be 3 feet from the corner front yard property line.
14. The Board found that Mr. Kelly testified that there are two letters of support from neighbors.
15. The Board found that Mr. Kelly testified that there are tiebacks from the bulkhead which extend 6 feet onto the property making it impossible to move the garage farther back on the lot. He believes that not much can be done in that area of the Property.
16. The Board found that Mr. Kelly testified that the garage will be used for storage of a car and the garage needs to be the proposed size in order to fit the car.
17. The Board found that Mr. Kelly testified that the house is not on pilings and there is no garage on the property.
18. The Board found that Mr. Kelly testified that Old Lighthouse Road is a dead end road with approximately 9 to 10 homes located off Old Lighthouse Road. He noted that DelDOT does not oppose the access.
19. The Board found that Mr. Kelly testified that the garage will measure 1 story and be approximately 12-15 feet tall.
20. The Board found that Mr. Kelly testified that he doubts the proposals will present visibility concerns.
21. The Board found that Mr. Kelly testified that it is not good for the vehicle to be left outside.
22. The Board found that Mr. Kelly testified that there is approximately 15 feet from the edge of paving of Old Lighthouse Road to the property line and the garage will be approximately 18 feet from the edge of paving of Old Lighthouse Road.
23. The Board found that Mr. Kelly testified that he would have to remove the deck to make the sunroom comply.
24. The Board found that no one appeared in support of or in opposition to the Application.
25. 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 variance for the sunroom met the standards for granting a variance. The findings below further support the Board's decision to approve the variance for the sunroom.
 - a. The Property is unique due to its size, shape, and development. The lot is a small lot consisting of approximately 8,834 square feet with an odd shape and bordering on three roads, one of which is a paper street. Due to these conditions, the building envelope is odd and unusually shaped. The buildable envelope is further limited since the Property was improved with a house that was built prior to changes in the Zoning Code which reduced the setback lines. The placement of the existing house limits where a sunroom and similar improvements can be located. These conditions have created an unnecessary hardship and exceptional practical difficulty for the Applicant who seeks to build a sunroom on the Property as noted above.
 - 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 with a sunroom in strict conformity with the Sussex County Zoning Code. The Applicant seeks to construct a proposed sunroom 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 for the sunroom are necessary to enable the reasonable use of the Property as the variances

will allow the Applicant to construct the sunroom on the lot. The Board is convinced that the size, shape, and location of the sunroom are reasonable.

- d. As it pertains to the sunroom, 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 has 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 he needs the variance in order to reasonably develop the Property with the sunroom as proposed.
 - e. The variances for the sunroom 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 sunroom will have no effect on the character of the neighborhood. The variances will allow the Applicant to place a reasonably sized sunroom as proposed. No substantial evidence was presented which demonstrated that the variances for the sunroom would somehow alter the essential character of the neighborhood or be detrimental to the public welfare. The Board notes that there is a large gap between the edge of paving of Old Lighthouse Road and the property line near the sunroom so the encroachment into the setback area where the sunroom is proposed is likely unnoticeable. Moreover, only a small portion of the sunroom will encroach into the setback area.
 - f. The variances sought for the sunroom 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 for the sunroom will allow the Applicant to place a reasonably sized sunroom on the Property on an area currently used for an open deck. The Board finds that the Applicant took reasonable measures to otherwise limit encroachments into the setback area but was constrained by the Property's unique conditions and prior development.
 - 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.
26. 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 variance for the garage failed to meet the standards for granting a variance. The findings below further support the Board's decision to deny the variance for the garage.
- a. The Applicant failed to demonstrate that the garage was necessary for the reasonable use of the lot. The garage will be used for the storage of a car but the Board was not convinced that such storage is necessary. There was no substantial evidence presented which convinced the Board that the Property could not otherwise be reasonably used without the existence of the garage. Moreover, the garage will be located in the rear of the lot and a large encroachment into the corner front yard is needed in order for the garage to be constructed. The Applicant is effectively placing the garage in an area where it cannot fit. The Applicant, however, is not entitled to have a garage of this size and in this location. For these reasons, the Board finds

that the variance for the garage is not necessary to enable reasonable use of the Property.

- b. The Board finds that the Applicant is creating its own exceptional practical difficulty by proposing to a construct a garage which does not fit within the building envelope. The Applicant's decision to construct this garage in this location is the reason for the need for a variance and has nothing to do with the size, shape, or condition of the Property. The Board was not convinced that the variance request was the product of a *need*. Instead, the variance request appears to be the product of a *want* as the Applicant seeks to build the garage as proposed for purposes of convenience, profit, and / or caprice. The Applicant has thus created its own exceptional practical difficulty.
- c. The Board finds that the Applicant failed to demonstrate that the variance would not alter the essential character of the neighborhood. The Applicant has constructed the garage exceptionally close to the corner front yard property line which is adjacent to Old Lighthouse Road. While there is a gap between the edge of paving of the road and the proposed location of the garage, the closeness of the garage to the road cannot be ignored and may affect visibility along Old Lighthouse Road, which would be detrimental to the public welfare as vehicles travel along Old Lighthouse Road.
- d. Since the variance for the garage is not necessary to enable the reasonable use of the Property, the Board also finds that the variance requested for the garage is not the minimum variance necessary to afford relief.

The Board granted the variance application for the sunroom finding that it met the standards for granting a variance and denied the variance application for the garage finding that it did not meet the standards for granting a variance.

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 to approve in part and deny in part were Mr. Jeffrey Chorman, Mr. Travis Hastings, and Mr. John Williamson. Mr. Jordan Warfel voted against the motion to approve the application for the sunroom and to deny the application for the garage. Dr. Kevin Carson 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