

**BEFORE THE BOARD OF ADJUSTMENT OF SUSSEX COUNTY**

**IN RE: TODD K. MOYER & ALLYSON L. MOYER**

**(Case No. 12609)**

A public hearing was held after due notice on September 20, 2021. The Board members present were: Mr. John T. Hastings, Mr. Jordan Warfel, and Mr. John Williamson.

Nature of the Proceedings

This is an application for a variance from the front yard setback requirement for a proposed structure.

Findings of Fact

The Board found that the Applicants are requesting a variance of 12.5 feet from the thirty (30) feet front yard setback requirement for proposed steps. This application pertains to certain real located on the north side of Baltimore Street within the Bay View Park Subdivision (911 Address: 39663 Baltimore Street, Bethany Beach); said property being identified as Sussex County Tax Map Parcel Number 1-34-20.11-32.00. 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, Findings of Fact for Case Nos. 11507, 12342, & 12482, a site plan dated July 19, 2021, a survey of the Property, letters of support, and a portion of the tax map of the area.
2. The Board found that the Office of Planning & Zoning received three letters in support of the Application and no correspondence in opposition the Application.
3. The Board found that Todd Moyer and Allison Moyer were sworn in to give testimony about the Application. John Sergovic, Esquire, presented the Application on behalf of the Applicants
4. The Board found that Mr. Sergovic stated that Bay View Park was developed prior to the subdivision ordinance being adopted by the County and that the Applicants' house was built around 1960.
5. The Board found that Mr. Sergovic stated that the houses in Bay View Park were haphazardly arranged and many houses need to be removed or elevated to meet the flood plain elevation requirements.
6. The Board found that Mr. Sergovic stated that the Applicants experienced flooding in both the front and rear of the Property. He noted that the front yard flooded from the road and the rear yard flooded from the tidal pond.
7. The Board found that Mr. Sergovic stated that the existing dwelling is located approximately 24 feet from Baltimore Street.
8. The Board found that Mr. Sergovic stated that the Applicants propose to demolish the existing dwelling and build a new elevated dwelling with off-street parking below the house.
9. The Board found that Mr. Sergovic stated that, in order to reach the elevated first floor, the steps will encroach into the front yard setback.
10. The Board found that Mr. Sergovic stated that the allowable encroachment for open and unenclosed steps is 5 feet and the Applicants need approximately 12.5 feet.
11. The Board found that Mr. Sergovic stated that there are previous variances in this subdivision.

12. The Board found that Mr. Sergovic stated that the uniqueness of the Property is that it measures only 7,167 square feet which is smaller than the minimum lot size in the MR district.
13. The Board found that Mr. Sergovic stated that there is no street parking in this area so parking will be on the Property and under the house.
14. The Board found that Mr. Sergovic stated that the Property cannot be developed to meet the flood plain regulations without obtaining a variance.
15. The Board found that Mr. Sergovic stated that the exceptional practical difficulty was not created by the Applicants.
16. The Board found that Mr. Sergovic stated that the variance will not alter the essential character of the neighborhood and that there is support for the request from neighbors.
17. The Board found that Mr. Sergovic stated that the requested variance is the minimum variance to afford relief.
18. The Board found that Mr. Sergovic stated that steps will be six feet wide to allow for emergency access if necessary.
19. The Board found that Mr. Sergovic stated that the proposed dwelling cannot be moved farther back on the rear of the Property.
20. The Board found that Mr. Sergovic stated that the side yard of this Property is considered the rear yard for the neighboring property to the east.
21. The Board found that Mr. Moyer affirmed the statements made by Mr. Sergovic as true and correct.
22. The Board found that Mr. Moyer testified that the dwelling will be moved back to the full 30 foot front yard setback and that the variance request is only for the steps to access the dwelling.
23. The Board found that Mr. Moyer testified that there are trees in the side yard that would prevent from building in that area.
24. The Board found that Mr. Moyer testified that all parking will be on the Property and that this proposal will improve parking on the lot.
25. The Board found that Mr. Moyer testified that the front steps are necessary to access the house and are similar to other homes in the neighborhood.
26. The Board found that Mr. Moyer testified that the steps cannot be changed as it would block access to the garage which will be located under the house at both sides of the steps.
27. The Board found that Mr. Moyer testified that there is a gap between the edge of paving and the front property line and that there is approximately 30 feet from the edge of paving to the proposed steps.
28. The Board found that Mr. Moyer testified that the house will be located on pilings and there will be no first-floor living. He noted that the new homes in the neighborhood are also built on pilings.
29. The Board found that Mr. Moyer testified that the prior house sustained approximately \$13,000.00 in damage from flooding after Hurricane Sandy.
30. The Board found that Mr. Moyer testified that the Property is adjacent to Cedar Pond which leads to the bay.
31. The Board found that one person appeared by teleconference in support of and no one appeared in opposition to the Application.
32. Based on the findings above and the testimony and evidence presented at the public hearing and the public record, which the Board found credible, persuasive, and un rebutted, the Board determined that the application met the standards for granting a variance. The findings below further support the Board's decision to approve the Application.
  - a. The Property is unique due to its size and susceptibility to flooding. The Property is only 70 feet wide and is smaller than minimum lots in the MR zoning district. The existing dwelling, which was constructed prior to the

enactment of the Sussex County Zoning Code, encroaches into the front yard setback area and suffered damage from flooding. The Applicants seek to replace that dwelling and to elevate the new home above the flood plain regulations. The new home will comply with the Zoning Code but the steps to access the first floor of the house will encroach into the setback area. Those steps will have additional steps because the first floor of the home is elevated above the flood plain. The dwelling needs to be elevated to avoid problems associated with flooding but the home cannot be raised while still complying with the Sussex County Zoning Code. While there is space in the rear yard for the home to be located, raising the home and moving it farther into the rear yard is problematic due to occasional flooding in the rear yard. The flooding problems limit an already small building envelope. The Property is also burdened by trees in the side yard which restrict the ability to construct a home in the side yard. The neighboring property to the side yard to the east is also the rear yard of that property rather than a side yard. The community also suffers from off-street parking issues and the design of the house and steps will allow for better off-street parking on the lot. The uniqueness of the Property has, thus, created an unnecessary hardship and exceptional practical difficulty for the Applicants.

- 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 situation, the Property cannot be developed in strict conformity with the Sussex County Zoning Code. The Applicants need to construct an elevated dwelling in order to avoid flooding problems and the steps needed to reach the first floor of the home will encroach into the setback area. Notably, there is water to the rear yard of the Property. The Applicants seek to construct an elevated dwelling to avoid the flooding problems and alleviate parking concerns but are unable to do so without violating the Sussex County Zoning Code. It is clear from the survey that the dwelling can be raised on the Property in strict conformity with the Sussex County Zoning Code but the steps cannot be located in compliance with the Code. The Board is thus convinced that the variance is necessary to enable the reasonable use of the Property as the variance will allow the Applicants to have reasonable access to the elevated dwelling. The Board is convinced that the size, shape, and location of the steps are reasonable. Notably, there will not be other encroachments into the setback areas.
- d. The unnecessary hardship and exceptional practical difficulty were not created by the Applicants. The Applicants acquired the Property in 2004 and did not create the size of the lot or the flooding issues. The Applicants also did not place the original dwelling on the Property. The dwelling was placed on the lot prior to the creation of the Sussex County Zoning Code and was damaged by flooding. The Applicants seek to replace it to avoid flood problems. As previously noted, the size of the lot and the flooding issues of the lot have created the unnecessary hardship and exceptional practical difficulty. The Board was convinced that the Applicants have not created the exceptional practical difficulty and unnecessary hardship. Furthermore, the Board is convinced that the Applicants did not come to the Property with an illegal use in mind. Rather, the Applicants are limited by the physical conditions of the Property and need to variance in order to continue the reasonable use thereof.
- 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 steps to the elevated home will have no effect on the

character of the neighborhood. The prior dwelling has been on the Property since the early 1960s and that dwelling encroached farther into the setback area and, despite the longstanding location of that dwelling, no complaints were noted in the record about its location. The Applicants intend to replace the home and move it farther away from the front property line but the steps will project into the setback area. No complaints were noted about this proposal either. Rather, letters of support to the request were noted in the record. The Board heard no evidence that the variance would somehow alter the essential character of the neighborhood or be detrimental to the public welfare. The Board also notes that there is a gap between the edge of paving of Baltimore Street and the front property line such that the steps will be approximately 30 feet from the edge of paving on the street so that the encroachment will not be as noticeable as it would be otherwise. Moreover, the proposed development should improve parking on the lot, which should help the neighborhood.

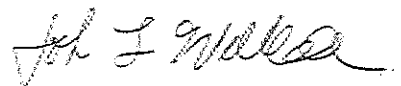
- f. The variance sought is the minimum variance necessary to afford relief and the variance requested represents the least modification possible of the regulation at issue. The Applicants have demonstrated that the variance sought will allow the Applicants to replace the damaged dwelling and to elevate the new dwelling to avoid flooding problems. The dwelling will not encroach into the setback areas but the steps will encroach. The Board is convinced that the Applicants looked at other ways to minimize the encroachment but were limited by the lot's unique conditions. The Board also finds that the Applicants could not move the home to the rear yard due to the flooding problems on the lot. As such, the steps will encroach in the front yard.
- 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.

The Board granted the variance application 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. The Board Members in favor were Mr. Travis Hastings, Mr. Jordan Warfel, and Mr. John Williamson. No Board Member voted against the motion to approve the Application. Dr. Kevin Carson and Mr. Jeffrey Chorman 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 November 15, 2021.