

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

**IN RE: MICHAEL MILLIGAN**

**(Case No. 12635)**

A hearing was held after due notice on December 13, 2021. The Board members present were: Dr. Kevin Carson, Mr. Jeff Chorman, and Mr. John Williamson.

Nature of the Proceedings

This is an application for a variance from maximum fence height requirement for an existing fence and a variance from front yard setback requirement for an existing structure.

Findings of Fact

The Board found that the Applicant is requesting the following variances:

1. A variance of 27.2 feet from the forty (40) feet front yard setback requirement for an existing shed; and
2. A variance of 2.0 feet from the maximum height requirement of 3.5 feet for an existing fence.

This application pertains to certain real property located on the east side of Jestice Farm Road approximately 810 feet north of Pepper Pond Lane (911 Address: 31531 Jestice Farm Road, Laurel); said property being identified as Sussex County Tax Map Parcel Number 232-19.00-12.02 (hereinafter "the Property"). 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 drawing of the fence, pictures, a survey of the Property dated June 29, 2021, 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 or in opposition to the Application.
3. The Board found that Michael Milligan was sworn in to give testimony about the Application.
4. The Board found that Mr. Milligan testified that he improved the entrance to the Property with a metal gate measuring 20 feet wide and brick pillars which are 5.5 feet tall. He noted that the fence is electric and has a keypad for emergencies.
5. The Board found that Mr. Milligan testified that he was unaware that he needed a variance for the shed.
6. The Board found that Mr. Milligan testified that the shed is on skids and will be moved into compliance with the Code.
7. The Board found that Mr. Milligan testified that there have been no complaints about the gate and pillars and that the gate and pillars do not cause any visibility issues for vehicles travelling on Jestice Farm Road.
8. The Board found that Mr. Milligan testified that there is approximately 10 feet from the edge of paving to the property line.
9. The Board found that Mr. Milligan testified that the fence is on the property line but cars entering the Property do not block traffic when waiting for the gate to open.
10. The Board found that Mr. Milligan testified that there are two lights which are on from dusk to dawn so it is visible at night.
11. The Board found that Mr. Milligan testified that the fence is necessary for security as the pole building on the Property has been broken into twice. He noted that the pole building stores cars and tools.

12. The Board found that Mr. Milligan testified that there are two entrances to the Property but the second entrance is not used as it is at the tax ditch line.
13. The Board found that Mr. Milligan testified that the tax ditch and trees influenced the location of the fence.
14. The Board found that Mr. Milligan testified that the gate is used approximately eight times a day.
15. The Board found that Mr. Milligan testified that there is a pending conditional use application on file with the County for a towing business. He noted that the gate is used for his personal and business uses and that, even if the conditional use is denied, he will need the fence.
16. The Board found that Mr. Milligan testified that the brick pillars cannot be moved but the shed will be brought into compliance with the Code.
17. The Board found that no one appeared in support of or in opposition to the Application.
18. 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 fence met the standards for granting a variance. The findings below further support the Board's decision to approve the variance for the fence.
  - a. The Property is unique as it is a lot wide lot but shallow in comparison. The Property is improved by a pole building that has been the subject of thefts and the Applicant needs a fence to limit access to the pole building. The Applicant was limited on where the fence could be located due to the location of the existing entrances, the pole building, the tax ditch, and large trees. These conditions greatly restrict the building envelope on the Property. It is clear to the Board that the lot's unique characteristics have created an unnecessary hardship and exceptional practical difficulty for the Applicant who seeks to retain the fence on the lot.
  - 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 and the thefts from the pole building, the Property cannot be developed in strict conformity with the Sussex County Zoning Code. The Applicant seeks to retain a fence on the Property for protection for the pole building but is unable to do so without violating the Sussex County Zoning Code. The Board is convinced that the variance is necessary to enable the reasonable use of the Property as the variance will allow the Applicant to retain the fence on the Property. The Board is convinced that the shape and location of the fence are also reasonable, which is confirmed when reviewing the survey provided by the Applicant. The fence is needed for the reasonable use of the Property because the fence will afford reasonable protection from theft.
  - d. The exceptional practical difficulty and unnecessary hardship were not created by the Applicant. The unique characteristics of the Property are clear when reviewing the survey and the Applicant's testimony. Moreover, the Applicant has suffered thefts and the fence is needed to help mitigate the thefts. The Board is convinced that the exceptional practical difficulty and unnecessary hardship were not created by the Applicant but was created the lot's unique characteristics.
  - e. The variance for the fence 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 fence will have no effect on the character of the neighborhood. The fence has been on the Property for some time but there has been no complaints noted in the record about the

fence. Furthermore, no evidence was presented which would indicate that the variance for the fence would somehow alter the essential character of the neighborhood or be detrimental to the public welfare. Moreover, there is a large gap from the edge of paving of Jestice Farm Road to the fence so the fence should not present any visibility concerns for drivers along Jestice Farm Road.

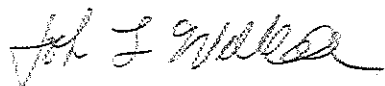
- f. The variance sought for the fence is the minimum variance necessary to afford relief and the variance requested represents the least modification possible of the regulation at issue. The Applicant has demonstrated that the variance sought for the fence will allow the Applicant to retain a reasonably sized fence on the Property. No modifications or additions to the fence are proposed. The fence cannot be moved into compliance with the Code either.
  - 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.
19. 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 shed failed to meet the standards for granting a variance. The findings below further support the Board's decision to deny the variance for the shed.
- a. The Applicant failed to demonstrate that the shed was needed and that the could not be placed in strict conformity with the Code. The record indicates that the shed is portable and the Board was not convinced that the shed could not otherwise be moved into compliance with the Code. Moreover, the Applicant has admitted that he can move the shed into compliance with the Code. For these reasons, the Board finds that the variance for shed is not necessary to enable reasonable use of the Property.
  - b. The Board finds that the Applicant created its own exceptional practical difficulty by placing the shed on the lot outside the building envelope. The Applicant's decision to place the shed in this location is the reason for the need for variance and has nothing to do with the size, shape, or condition of the Property. The Board was not convinced that the variance request for the shed was the product of a *need*. Instead, the variance requests appear to be the product of a *want* as the Applicant seeks to retain the shed for purposes of convenience, profit, and / or caprice. Moreover, the Applicant failed to demonstrate that the shed, which is portable, cannot be moved into the compliance. The Board was not convinced that the variance needed for the shed was due to a unique condition of the Property. Rather, the Applicant's decision place the shed outside the building envelope is the reason for the variance for the shed. The Applicant has thus created his own exceptional practical difficulty.
  - c. Since the variance for the shed is not necessary to enable the reasonable use of the Property, the Board also finds that the variance requested for the shed is not the minimum variance necessary to afford relief. Moreover, the Applicant has testified that he can move the shed into compliance with the Code.

The Board granted the variance application for the fence finding that the variance application for the fence met the standards for granting a variance and denied the variance application for the shed finding that the variance application for the shed did not meet the standards for granting a variance.

### Decision of the Board

Upon motion duly made and seconded, the variance application for the fence was approved and the variance application for the shed was denied. The Board Members in favor of the motion to approve the variance for the fence and to deny the variance for the shed were: Dr. Kevin Carson, Mr. Jeffrey Chorman, and Mr. John Williamson. No Board Member voted against the motion to approve the application for the fence and to deny the variance application for the shed. Mr. Travis Hastings and Mr. Jordan Warfel 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 February 7, 2022.