

BEFORE THE BOARD OF ADJUSTMENT OF SUSSEX COUNTY

IN RE: DMR PROPERTIES, LLC

(Case No. 12654)

A hearing was held after due notice on January 24, 2022. The Board members present were: Dr. Kevin Carson, Mr. Jeff Chorman, 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 and the rear yard setback requirements for a proposed structure.

Findings of Fact

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

1. A variance of 6.58 feet from the sixty (60) feet front yard setback requirement for a proposed building; and
2. A variance of 10 feet from the thirty (30) feet rear yard setback requirement for a proposed building.

This application pertains to certain real property located at the west side of John J. Williams Highway (Route 14) approximately 851 feet north of Bay Farm Road (911 Address: N/A) said property being identified as Sussex County Tax Map Parcel Number 234-23.00-180.00 and 234-23.00-181.00 (collectively "the Property"). After a public hearing, the Board made the following findings of fact:

1. The Board was given copies of the Application, a portion of the tax map of the area, an aerial photograph of the Property, a conceptual site plan of the Property dated November 23, 2021, a boundary plan of the Property dated December 1, 2021, metes and bounds of the Property, deeds to the Property, and a subdivision plan dated August 1952.
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 Robert Aaronson and Mark Davidson were sworn in to testify about the Application. David Hutt, Esquire, appeared on behalf of the Applicant.
4. The Board found that Mr. Hutt stated that the Property consists of two lots that will become one parcel. The Property is located on the west side of Route 24 and is zoned General Commercial. He noted that there are many commercial uses along Route 24 in this area including a Dollar General, Kick n Chicken, Cadia Healthcare, Tidemark Federal Credit Union, Wawa, restaurants, WSFS bank, retail shops, Giant grocery store, a carwash, and Harris Teeter.
5. The Board found that Mr. Hutt stated that the Property is presently unimproved but, because the Property is adjacent to residential property, the setbacks are increased. He noted that, if the Property was adjacent to commercial property, the setbacks would only be 5 feet in the rear and 5 feet on the side. In this case, however, the rear yard setback is 30 feet and the side yard setback is 20 feet due to the proximity to residential property.
6. The Board found that Mr. Hutt stated that the request for the rear yard variance is to reduce the setback from 30 feet to 20 feet and that there is no variance sought from the side yard. The Applicant also seeks a variance from the front yard setback requirement.

7. The Board found that Mr. Hutt stated that these lots were subdivided in 1952 by Elijah Steel and the lots measured 75 feet by 150 feet but, in 2017, DelDOT acquired 26 feet of these lots making the lots 75 feet by 124 feet.
8. The Board found that Mr. Hutt stated that a number of efforts were made by the prior owner to develop the Property but that, due to the narrowness of the lots and the reduced depth of the lots, it was not feasible to develop them individually even with a shared entrance.
9. The Board found that Mr. Hutt stated that the lots have to be combined to create a safe ingress and egress and also to provide space for safe maneuvering within the site and that space is needed for stormwater management as well.
10. The Board found that Mr. Hutt stated that the Applicant tried other layouts but they were not otherwise viable.
11. The Board found that Mr. Hutt stated that DelDOT also has a 15 foot permanent easement.
12. The Board found that Mr. Hutt stated that the proposed building was designed to be close to the property line of the commercial use to the south which keeps the building away from the residential use to the north side where the entrance would be located.
13. The Board found that Mr. Hutt stated that this layout is similar to the Dollar General building which is located a few properties to the north of the Property.
14. The Board found that Mr. Hutt stated that the Property is unique because of its shallow depth.
15. The Board found that Mr. Hutt stated that the exceptional practical difficulty was not created by the Applicant but was created when DelDOT acquired 26 feet right-of-way.
16. The Board found that Mr. Hutt stated that the variance is necessary to enable the reasonable use of the Property because DelDOT took 17% of the overall depth and with the current setbacks any building could only have a depth of 34 feet. He noted that, prior to the taking, the building envelope was 60 feet deep.
17. The Board found that Mr. Hutt stated that the Property cannot otherwise be developed.
18. The Board found that Mr. Hutt stated that, if the building was wider, the turning radius would be lost. He noted that the Applicant cannot have vehicles back out onto Route 24 and all vehicles must be able to turn around on the site.
19. The Board found that Mr. Hutt stated that the Applicant did not create the shallowness of the lot.
20. The Board found that Mr. Hutt stated that granting the variance will not alter the essential character of the neighborhood as the building will be consistent with the commercial nature of Route 24. He noted that other structures on neighboring lots are closer to Route 24 than the building proposed on the site.
21. The Board found that Mr. Hutt stated that the Applicant will install a solid fence as a buffer between the Property and the residential property to the rear.
22. The Board found that Mr. Hutt stated that the requested variances are the minimum variances to afford relief.
23. The Board found that Mr. Hutt stated that both variances total 16.58 feet.
24. The Board found that Mr. Hutt stated that averaging for the front yard setback was not used because of the different zoning districts along this portion of Route 24.
25. The Board found that Mr. Hutt stated that the Applicant has proffered two conditions of approval: 1) that that both lots must be combined and 2) that a fence be installed along the rear boundary of the Property.
26. The Board found that Mr. Aaronson and Mr. Davidson affirmed that the statements made by Mr. Hutt as true and correct.
27. The Board found that Mr. Aaronson testified that the proposed use will be for a retail operation that will not have late nights and that the building will not have a drive-thru window.

28. The Board found that Mr. Aaronson testified that deliveries to the building will be made once a week.
29. The Board found that Mr. Aaronson testified that the building will consist of 4,000 square feet.
30. The Board found that Mr. Aaronson testified that this location will be a retail operation used primarily by homeowners and that the commercial customers will likely use the proposed location in Georgetown.
31. The Board found that Mr. Aaronson testified that the Applicant purchased the Property in 2021.
32. The Board found that Mr. Davidson testified that his company has been working on the Property with the previous owner.
33. The Board found that Mr. Davidson testified that there has been a pre-submittal meeting with DelDOT regarding the proposed commercial entrance.
34. The Board found that Mr. Davidson testified that the reduction of the 15 feet permanent easement was approved at that meeting and that the request for a 36 feet wide entrance for safe ingress and egress may be part of the improvements along Route 24.
35. The Board found that Mr. Davidson testified that the HVAC system will be on the roof of the building and that there are no steps or loading dock that further encroach into setbacks.
36. The Board found that no one appeared in support of or in opposition to the Application.
37. 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 small building envelope, the taking by DelDOT, and the development of adjacent properties. While the Property consists of two lots, which the Applicant intends to combine, and is zoned commercial, the Property is adjacent to residential properties which require a greater setback. DelDOT has taken parts of the front of the Property thereby reducing the building envelope by 26 feet. Due to other regulations, such as parking, stormwater, and DelDOT entrance requirements, a significant portion of the Property is unbuildable. This small building envelope is further limited by the 60 feet front yard setback requirement from Route 24 and the 30 feet rear yard setback requirement and 20 feet side yard setback requirement from residential properties to the rear and side. The Applicant intends to construct a 4,000 square foot building to accommodate a retail painting business but the Applicant is unable to construct the building without encroaching into the setback areas. The Property is also unique because DelDOT has taken a portion of the front yard for the Route 24 widening project and that taking has further limited the building envelope of the Property. The Board finds that the lot's unique conditions have created an unnecessary hardship and exceptional practical difficulty for the Applicant who seeks to construct a reasonably sized building 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, the Property cannot be developed in strict conformity with the Sussex County Zoning Code. The Property has a unique and limited buildable area. The Applicant seeks to construct a reasonable retail building 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 a reasonably sized building to be constructed on the Property. The Board is convinced that the shape and location of the building are also reasonable, which is confirmed when reviewing the survey provided by the Applicant.

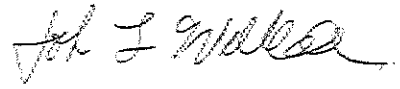
- d. The unnecessary hardship and exceptional practical difficulty were not created by the Applicant. As previously stated, the Property has unique conditions and these conditions have resulted in a limited building envelope on the Property. These conditions have created the unnecessary hardship and exceptional practical difficulty. The Applicant only recently acquired the Property and is constrained by the prior taking by DeIDOT.
- 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 building will have no effect on the character of the neighborhood. The building will be similarly situated to other commercial buildings in the area. The surrounding area is largely commercial in nature and the use is consistent with that use. There was no substantial evidence that the building would somehow alter the essential character of the neighborhood. The Board notes that no letters in opposition or testimony in opposition were presented to the Board.
- 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 Applicant to construct a reasonably sized building on the Property. The Board is convinced that the Applicant explored other options for the size, shape, and location of the building 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 approval is subject to the following conditions proffered by the Applicant:
 - i. The two lots which consist of the Property shall be combined into one lot; and
 - ii. A fence shall be installed along the rear of the Property.

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 with conditions were Dr. Kevin Carson, Mr. Jeffrey Chorman, Mr. Travis Hastings, Mr. Jordan Warfel, and Mr. John Williamson. No Board Member voted against the Motion to approve the variance 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 March 21, 2022.