

BEFORE THE BOARD OF ADJUSTMENT OF SUSSEX COUNTY

IN RE: GLENN FLEMING, BRANDON FLEMING, AND JAMIE FLEMING

(Case No. 12724)

Hearings were held after due notice on August 1, 2022, and September 12, 2022. The Board members present were: Mr. Jeffrey Chorman, Mr. Jordan Warfel, and Mr. John Williamson. Dr. Kevin Carson was not present at the August 1st meeting but was present at the September 12th meeting and had reviewed the record of the August 1st meeting.

Nature of the Proceedings

This is an application for a special use exception to operate a commercial dog kennel on a property of less than 5 acres and variances from the 200 feet required distance from any lot line for a proposed commercial kennel

Findings of Fact

The Board found that the Applicants are requesting the following:

1. A special use exception for a commercial dog kennel;
2. A variance of 14.3 feet from the 200 feet setback requirement for a commercial kennel, cages, and runs from the west property line;
3. A variance of 40 feet from the 200 feet setback requirement for a commercial kennel, cages, and runs from the north property line;
4. A variance of 190.5 feet from the 200 feet setback requirement for a commercial kennel, cages, and runs from the south property line.

This application pertains to certain real property located on Woodpecker Road approximately 479 feet from Old Carriage Road (911 Address: N/A) said property being identified as Sussex County Tax Map Parcel Number 531-14.00-31.00 ("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, an undated site plan of the Property, literature on the proposed kennel, an email from the Applicant, photographs, correspondence 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 two (2) letters in opposition to the Application.
3. The Board found that Jamie Fleming and Glenn Fleming were sworn in to give testimony about the Application. Ms. Fleming submitted an exhibit to the Board.
4. The Board found that Ms. Fleming testified that she is seeking the variances for a kennel for breeding purposes and that the kennel will not be used for boarding of dogs.
5. The Board found that Ms. Fleming testified that there will not be traffic associated with the kennel except for the sale of puppies.
6. The Board found that Ms. Fleming testified that the variances are needed because the Applicants do not meet the 5 acre minimum for a commercial dog kennel.
7. The Board found that Ms. Fleming testified that the most adjacent neighbors have said that they do not oppose the requests.
8. The Board found that Ms. Fleming testified that she has placed the structure as far into the Property as she can to be away from the neighboring properties.
9. The Board found that Ms. Fleming testified that the dogs being bred are French Bulldogs that will not be left outside for long periods of time. She noted that French

Bulldogs are a small breed that rarely barks but she will be placing fencing to limit noise also.

10. The Board found that Ms. Fleming testified that she needs the kennel to be placed prior to the issuance of licensing.
11. The Board found that Ms. Fleming testified that her family owns Parcels 31, 30, 65, and 109 shown on the tax map but the entire structure will be on Parcel 31.
12. The Board found that Ms. Fleming testified that the Applicants were considerate of neighbors by placing the commercial dog kennel away from the neighboring dwellings.
13. The Board found that Ms. Fleming testified that the building will be measure 20 feet by 36 feet with 8 feet runs on the outside and the structure would house 12-15 dogs permanently.
14. The Board found that Ms. Fleming testified that the licensing requires a separate building for the mother and puppies which would be a smaller building on the Property and not require any variances.
15. The Board found that Ms. Fleming testified that 2-3 dogs would be bred at the same time and use that additional building.
16. The Board found that Ms. Fleming testified that the dogs range in size from 16 lbs. to 25 lbs.
17. The Board found that Ms. Fleming testified that the fence would be a double-paned, white vinyl fence that will be as high as County Code allows. She noted that the additional fencing would serve a dual purpose of protection for the animals as well as noise abatement.
18. The Board found that Ms. Fleming testified that the dogs will have indoor / outdoor access but she has no problem with having them remain indoors after a certain hour.
19. The Board found that Ms. Fleming testified that the lot is currently still wooded so a portion will be cleared for the placement of the kennel.
20. The Board found that Ms. Fleming testified that the business is currently operating out of her home on Parcel 109 with less dogs than she will have if this Application is approved. She noted that, once the business is turned over to her, there will be a total of twelve (12) or thirteen (13) females and one (1) male ranging in ages from not yet ready to breed to almost retired from breeding. This number of dogs does not include the puppies as they will not be staying permanently.
21. The Board found that Ms. Fleming testified that there will fourteen (14) total adults for breeding purposes and the dogs will be bred once a year. She noted that each female could potentially have three (3) to eight (8) puppies.
22. The Board found that Ms. Fleming testified that they do not start until the age of two (2) and skip a heat between breeding and that each female would be retired by the age of six (6). She plans to stagger the pregnancies of the dogs so as to not have too many litters at the same time.
23. The Board found that Ms. Fleming testified that Parcel 110 is owned by the State and is a social work house and Parcel 29 is an adjoining neighbor.
24. The Board found that Ms. Fleming testified that she was trying to place the building as close to the woods as possible to minimize the impact of noise on neighbors.
25. The Board found that Ms. Fleming testified that her family owns the four (4) adjoining lots and that the lot on the corner was formerly owned by her family also but was sold. She noted that, prior to the sale of the lot on the corner, her family owned a combined 5 acres.
26. The Board found that Ms. Fleming testified that two (2) businesses have been run on the Property in the past, including a Christmas tree business and an electrical business.
27. The Board found that Ms. Fleming testified that, if the property on the corner lot was not sold, she would not need that variance from the acreage requirement.

28. The Board found that Ms. Fleming testified that the building itself will be either a shed or pole building type structure.
29. The Board found that Ms. Fleming testified that everything around the Property is a rural farm type use area.
30. The Board found that Ms. Fleming testified that you would not be able to see the building from the road but would have to access it from the driveway. She noted that, from a distance, it will appear to be a barn type structure with a fence around it.
31. The Board found that Ms. Fleming testified that there will be no signs or advertisements on the Property.
32. The Board found that Ms. Fleming testified that a portion of the property that was sold was owned by her grandparents and that her brother, father, and she now own the Property together.
33. The Board found that Mr. Fleming testified that his parents bought the corner lot in the 1950s and that his mother, who was in poor health, sold the corner lot to build an addition onto her sister's home in Salisbury. He noted that the properties have been in their family for a long time.
34. The Board found that Mr. Fleming testified that he survived both his mother and sister and has added his children to the remaining family properties.
35. The Board found that Mr. Fleming testified that the properties have been in this shape since they were purchased by his parents over time as they were sold off in sections.
36. The Board found that Ron Russell, David Milliken, James Henry, and Jacqueline Carnck sworn in to testify in opposition to this Application. Mr. Russell submitted an exhibit to the Board.
37. The Board found that Mr. Russell testified that the Henrys live next door to the Property and that most of the opposition here tonight lives on the adjacent properties within 1,000 feet of the Property. He noted that he resides a couple of lots away and he has known the Flemings for years and has no animosity towards them but his interest is the neighborhood.
38. The Board found that Mr. Russell testified that an adjacent neighbor has a medical condition that is worsened by stress and anxiety.
39. The Board found that Mr. Russell testified that the Henrys are about 160 feet away from the proposed commercial dog kennel.
40. The Board found that Mr. Russell testified that noise is not the issue but sound is and that sound is measured in intensity by measuring decibel level. He noted that decibels are not a standard 10 unit increase but a 10 times increase of sound and that the higher you go up, for example an increase of 50-100 decibels increases in sounds intensity by 100,000.
41. The Board found that Mr. Russell testified that one neighbor has a French Bulldog and they can bark at a range of 80-100 decibels. He is unaware of any complaints about that dog.
42. The Board found that Mr. Russell testified that human exposure to sound at 70 decibels can cause stress and at 80 decibels for two (2) hours or more can cause hearing damage.
43. The Board found that Mr. Russell testified that he worked at a DuPont manufacturing site and any noise level over 80 decibels they were required to wear ear plugs and that, according to OSHA, exposure to decibel levels over 80 can lead to higher heart rate, respiration rate, and tinnitus (ringing in the ears) may occur. He believes that fences and trees provide virtually no protection for sound traveling.
44. The Board found that Mr. Russell testified that the trees in their area have leaves to the tops of the tree but not towards ground level and that, in the winter, the trees do not maintain their leaves. He noted that the trees are oaks, gums, and maples, which are deciduous trees not evergreen trees.
45. The Board found that Mr. Russell testified that there is large shrubbery but not sound barrier shrubbery.

46. The Board found that Mr. Russell testified that, if a fence is put up, he might not be able to see their property in the winter months.
47. The Board found that Mr. Russell testified that the Applicants stated in their application that the building on the outside would look like a building found in a rural area and the fencing placed around it would look more traditional as well as help to cut down on noise.
48. The Board found that Mr. Russell testified that the Henrys who live the closest are going to be subject to 70 plus decibels of noise and that the noise will definitely affect Mrs. Henry and aggravate her disease due to stress.
49. The Board found that Mr. Russell testified that the sound that will travel through to the other neighboring properties will not likely affect their health but will definitely be a nuisance with potential constant barking.
50. The Board found that Mr. Russell testified that noise levels within a dog kennel can exceed 100 decibels and the sound will travel.
51. The Board found that Mr. Russell testified that they have presented scientific information in regards to the noise and its impact on neighboring properties and are asking based on that the variances be denied. He also stated that the essential character of the neighborhood will be affected.
52. The Board found that Mr. Russell testified that there have been no studies on property values being affected by dog kennels but, in one study, the value of homes depreciated by 30% when next to a dog kennel due to the associated traffic noise.
53. The Board found that Mr. Russell testified that he has lived there 40 years and would not have built his home there if the kennel already existed.
54. The Board found that Mr. Milliken testified that he resides on Parcel 56 and he owns the French Bulldog that was previously spoken about. He noted that his dog's bark is shrill and annoying at times. He noted that he loves his dog but cannot imagine having fifteen (15) of them and he believes that the noise from that many dogs would be a bit much echoing through the woods.
55. The Board found that Mr. Milliken testified that he has resided in the neighborhood for fifty-six (56) years, which is all his life.
56. The Board found that Mr. Henry testified that he resides at Parcel 59.01 directly adjacent to the Applicants' property.
57. The Board found that Mr. Henry testified that his wife has systemic lupus and is very susceptible to stress and, when he and his wife were looking for property in Delaware, they found the lot the currently live on.
58. The Board found that Mr. Henry testified that they liked that it was a residential area with no poultry houses or commercial properties on Old Carriage Road.
59. The Board found that Mr. Henry testified that it was a fully wooded lot which they had cleared to place their home and they have spent a great deal of investment to make this retirement home what they wanted.
60. The Board found that Mr. Henry testified that the thought of a commercial dog kennel next to his property turns his stomach.
61. The Board found that Mr. Henry testified that there has been construction going on next door already.
62. The Board found that Mr. Henry testified that, if this application is approved, it will change the neighborhood and will ruin the ambiance.
63. The Board found that Mr. Henry testified that he considers that building to be rather large.
64. The Board found that Mr. Henry testified that he is concerned where is the feces going to go and he is also concerned about the manning of this kennel; particularly whether someone will be there to quiet the animals. He also has concerns if the washing out the kennels will the water go into the groundwater systems.
65. The Board found that Mr. Henry testified that, once this is approved, they can do what they want over there to include bathing and sheering of dogs.

66. The Board found that Ms. Carnck testified that she resides on Parcel 59.02 and is new to the neighborhood as they have lived there about a year and a half. She noted that they moved there specifically for the peace and quiet and that she feels that the dog kennel is not going to afford her that.
67. The Board found that Ms. Fleming testified that, due to these being short-haired dogs, there is no sheering.
68. The Board found that Ms. Fleming testified that bathing of the dogs will take place on an "as needed" basis but it is in the interest of the dog's health to not bath them frequently.
69. The Board found that Ms. Fleming testified that the feces will be taken by the State after being placed in a dumpster on the premises and that the washing down of the kennels will be at a minimum.
70. The Board found that Ms. Fleming testified that this is a rural area with sees the use of tractors and airplanes in addition to the spraying of chemicals which likely enter the ground water.
71. The Board found that Ms. Fleming testified that, once operational, someone would be onsite at all times and her goal is to make this her fulltime job.
72. The Board found that Ms. Fleming testified that the dogs would be placed on the side facing away from the neighbors to minimize sound to the neighbors.
73. The Board found that Ms. Fleming testified that she has had up to four (4) French Bulldogs in her home and received no complaints even when taking them outside.
74. The Board found that Ms. Fleming testified that she will be shrinking the kennel down in size compared to the documents submitted and the size of the building will be the minimum that she needs for the dogs and storage of necessary materials. She is looking at a 30 foot by 40 foot building.
75. The Board found that Ms. Fleming testified that the additional building will be a shed with a desk to hold her paperwork to be separate from her residence and that the kennel will be heated, air conditioned, have water access at all times, indoor outdoor areas and covering from the sun as required by the State. She noted that there will be ventilation with fans as they are required also.
76. The Board found that Ms. Fleming testified that this is a fairly significant investment and she is aware of the five (5) year term of approval by the board.
77. The Board found that Ms. Fleming testified that the kennel will employ her, her children, and potentially one other person for when she is not available.
78. The Board found that Ms. Fleming testified that the maximum amount of dogs on the property could potentially be thirty-three (33) dogs and that the puppies would only be on site for eight (8) weeks before being sold.
79. The Board found that Ms. Fleming testified that the open runs are a requirement but they can be covered.
80. The Board found that Ms. Fleming testified that they need to have additional space to allow the dogs to urinate and defecate in the area away from where they sleep.
81. The Board found that one (1) person appeared in support of and seven (7) persons appeared in opposition to the Application.
82. The Board voted to leave the record open for the limited purpose of allowing the Applicants to submit a site plan of the proposal by August 31, 2022, and to schedule the matter for a hearing on September 12, 2022, with comments only as to the new site plan. A second hearing was held on September 12, 2022.
83. On September 12, 2022, the Board held a second hearing on the matter. Dr. Kevin Carson, who was not present at the first hearing, stated that he reviewed the record and testimony from the prior hearing and he participated in the second hearing. Prior to the hearing, the Applicant submitted a site plan of the Property dated August 26, 2022. At the second hearing, Jamie Fleming was sworn in and testified.
84. The Board found that Ms. Fleming testified that the woodshed on the plan is actually a lean-to for covering firewood and they could move it if necessary but the

structure is just a roof. She noted that the woodshed is not a part of the kennel and that the other shed is a storage shed. The variance request, however, is only for the dog kennel.

85. The Board found that Ms. Fleming testified that there is a driveway off Woodpecker Road that goes straight to the house and to the left past the garage and pole building behind the garage.
86. The Board found that Ms. Fleming testified that the dumpster used for the fecal matter will be located on the left side of the pole building but not directly next to the kennel.
87. At the hearing on September 12, 2022, the Board found that no one appeared in support of or in opposition to the Application.
88. 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 met the standards for granting a special use exception because the commercial dog kennel will not substantially affect adversely the uses of neighboring and adjacent properties. The findings below further support the Board's decision to approve the special use exception.
 - a. The Property is a large lot consisting of approximately 2.17 acres as shown on the survey and tax map. The Property is one of several lots in the area owned by the Applicants' family and has been in the Applicants' family for decades.
 - b. The Property is surrounded by agricultural and residential lands in a largely rural area.
 - c. The number of dogs served at the kennel is limited and reasonable. The Applicants will have 12-15 dogs permanently on site and will breed the female dogs periodically. The kennel will not be used for boarding or commercial use that is generally open to the public.
 - d. The traffic generated by the facility is limited and does not appear to have a large impact on the neighborhood. The Applicants noted that the kennel will be used for breeding purposes and the Applicants will employ family members and, possibly, one other employee. The traffic should be limited to those employees and persons who purchase puppies. As previously noted, the proposed kennel will not be used for boarding thereby further limiting the traffic impact.
 - e. The opposition's main concern focused on the noise generating from the facility but no one presented substantial evidence that the noise from the kennel would be excessive. Rather, most of the concerns appeared speculative in nature since the kennel is not yet in existence. The Board notes that one member of the opposition presented literature on dog kennels which said that one study documented that animal shelters regularly exceed 100 decibels. The Applicants, however, are not proposing an animal shelter. Rather, the Applicants propose a facility used for breeding small puppies. The literature also said that owners of kennels can take noise abatement measures. In this case, the Applicants propose to have the dogs housed inside and will install solid fencing near existing vegetation. Moreover, the kennel will be located 160 feet from the nearest, non-family, residential property. The Board finds that these sound abatement measures should help to reduce the sound impact, if any, from the kennel.
 - f. There was no substantial evidence that the kennel would result in issues with traffic or lighting. Moreover, the kennel will not have any signage.
 - g. There is a substantial vegetative buffer around the site which should provide a sound and visual barrier from the site. The opposition noted that trees in the area are generally deciduous trees. To the extent that the vegetative

buffer does not suffice, the Applicant also intends to surround the kennel with a solid fence that should further obstruct views and reduce sound emissions from the site.

- h. The Applicants live on or adjacent to the Property and have direct control over the kennel operations and can address any minor noise issues that may come from barking dogs at the kennel.
- i. The Board finds credible the Applicants' testimony that there are agricultural uses in the neighborhood which likely produce significant noise such as tractors and crop-dusters.
- j. The dogs which will use the facility will primarily be located inside the facility with limited outdoor access. To the extent the dogs go outside, the Applicants have a fenced-in back yard for the dogs which will be appropriately supervised.
- k. These measures should limit the noise emanating from the site and, ultimately, the Board is satisfied that the controls set forth by the Applicants will adequately protect neighboring properties from the sounds of the dogs barking.
- l. There is no clear evidence that the use of the property as a kennel will have a substantial, adverse effect on the uses of neighboring or adjacent properties. There was not credible testimony that the use will have an adverse impact upon property values. The literature provided by the opposition even notes that there "does not appear to be any property value impact studies specific to dog kennels."
- m. The special use exception was approved for a period of five (5) years.

89. 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 met the standards for granting a variance. The findings below further support the Board's decision to approve the variance application.

- a. The Property is unique due to its size, shape, and historical development. The Property consists of approximately 2.17 acres and has a long narrow strip extending to Woodpecker Road. The Property has been owned by the Applicants' family for several decades and other neighboring lots are also owned by the Applicants' family. The Board notes that the prior subdivision of the larger parcel by a prior owner reduced the size of the Property. Due to the narrowness of the Property, the lot cannot be used for a commercial dog kennel without a variance. The Applicants propose to place the commercial dog kennel and related structures close to the shared property line with other lands of the Applicants' family but, even with such measures, variances are needed. The Board finds that these conditions are unique and have created an exceptional practical difficulty and unnecessary hardship 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 lot and situation, the Property cannot be developed in strict conformity with the Sussex County Zoning Code. The Applicants seek to use the Property for a commercial dog kennel but are 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 commercial dog kennel and related structures to be used on the Property. The Board is convinced that the size, shape, and location of the commercial dog kennel and related structures are reasonable.

- d. The exceptional practical difficulty and unnecessary hardship were not created by the Applicants. The Property has unique conditions as aforesaid and the unique characteristics of the Property are clear when reviewing the survey and the testimony from the Applicants. The Board is convinced that the unnecessary hardship and exceptional practical difficulty were not created by the Applicants but were created the lot's unique characteristics and creation of the lot by a prior owner which greatly constrained by the development of the Property.
- 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 commercial dog kennel and related structures will have no adverse effect on the character of the neighborhood. The neighborhood is rural in nature and the use is consistent with uses in the neighborhood. The surrounding area has farms with tractors and crop-dusters as well as residences. The proposed commercial dog kennel and related structures will be located away from lands owned by non-family members and the Applicants will take measures to limit the impact of the commercial dog kennel and related structures on neighboring properties. Furthermore, the Board was not convinced by the opposition that the variances would somehow alter the essential character of the neighborhood or be detrimental to the public welfare.
- f. The variances sought are the minimum variances necessary to afford relief and the variances requested represent the least modifications possible of the regulations at issue. The Applicants have demonstrated that the variances sought will allow the commercial dog kennel and related structures to be reasonably used. The Applicants have designed the commercial dog kennel and related structures to be located away from non-family lands and the Applicants have taken measures to reduce the size of the operation. The Board notes that this commercial dog kennel and related structures will not be used for boarding or other similar activities which would require larger space, parking, or a large number of employees.
- 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 special use exception for a period of five (5) years and variance finding that the Application met the standards for granting a special use exception and variance.

Decision of the Board

Upon motion duly made and seconded, the special use exception application was approved for a period of five (5) years and variance application was approved. The Board Members in favor were Dr. Kevin Carson, Mr. Jeffrey Chorman, and Mr. John Williamson. Mr. Jordan Warfel voted against the Motion to approve the special use exception and variance application. Mr. Travis Hastings did not participate in the discussion or vote on this application.

BOARD OF ADJUSTMENT
OF SUSSEX COUNTY



Jeffrey Chorman
Chair

If the use is not established within two (2)
years from the date below the application
becomes void.

Date November 7, 2022