

BEFORE THE BOARD OF ADJUSTMENT OF SUSSEX COUNTY

IN RE: THOMAS KIRACOFE & LISA KIRACOFE

(Case No. 12767)

A hearing was held after due notice on December 12, 2022. The Board members present were: Dr. Kevin Carson, Mr. Jeffrey Chorman, Mr. John T. Hastings, Mr. Jordan Warfel, and Mr. John Williamson.

Nature of the Proceedings

This is an application for variances from the maximum fence height requirement for an existing fence.

Findings of Fact

The Board found that the Applicants are requesting the following variances:

1. A variance of 2.5 feet from the 3.5 feet maximum fence height requirement for a fence measuring 22 feet in length; and
2. A variance of 0.5 feet from the 3.5 feet maximum fence height requirement for a fence measuring 8 feet in length.

This application pertains to certain real property on the southeast side of West Mint Place within the Mulberry Knoll Subdivision (911 Address: 34810 West Mint Place, Lewes); said property being identified as Sussex County Tax Map Parcel Number 334-18.00-146.00 ("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, a drawing of the Property, a building permit, a survey of the Property dated August 26, 2003, letters supporting the Application, Findings of Fact for Case No. 10722-2010, an email from the Applicants, photographs, and a portion of the tax map of the area.
2. The Board found that the Office of Planning & Zoning received 16 letters in support of and no correspondence in opposition to the Application.
3. The Board found that Thomas Kiracofe and Lisa Kiracofe were sworn in to testify about the Application.
4. The Board found that Mr. Kiracofe testified that the fence he installed was something he and the neighbor on the opposite side of the fence agreed to put up.
5. The Board found that Mr. Kiracofe testified that the neighbor's lot is relatively small and faces Mulberry Knoll Road while the Applicants' home faces West Mint Place.
6. The Board found that Mr. Kiracofe testified that the Applicants and their neighbor wanted more privacy and agreed to put the fence in after obtaining the permit.
7. The Board found that Mr. Kiracofe testified that he obtained the permit and constructed the fence but was informed at the time the County officials inspected the fence that the fence exceeded the fence height requirement. He testified that he knew that the fence could not exceed 7 feet tall but he did not realize that the side yard was included in the fence height limitation.
8. The Board found that Mr. Kiracofe testified that West Mint Place is a relatively quiet street with only four (4) houses and that all of the neighbors have agreed that this fence will not affect the character of the neighborhood.
9. The Board found that Mr. Kiracofe testified that he left the front section of fence at a lower height so that it would be visible when he pulled out of the driveway.
10. The Board found that Mr. Kiracofe testified that the intent of the fence was for him and the neighbor to have more privacy.

11. The Board found that Mr. Kiracofe testified that reducing the height of the fence within the 30 feet front setback would not afford them the privacy that they have been afforded by the fence being there.
12. The Board found that Mr. Kiracofe testified that no homeowner association approval is needed.
13. The Board found that Mr. Kiracofe testified that he does not believe the fence will cause any traffic issues.
14. The Board found that Mr. Kiracofe testified that the distance between the end of the fence and the edge of paving is 17 feet. He noted that there is a gap of 15 feet from the front property line to the edge of paving of West Mint Place.
15. The Board found that Mr. Kiracofe testified that their neighbor's rear yard backs up to the Applicants' side yard.
16. The Board found that Mr. Kiracofe testified that the Applicants purchased the Property at a foreclosure sale and did not place the house on the Property.
17. The Board found that Mr. Kiracofe testified that he wanted the neighbors to still have a view of Love Creek and the water from their back porch.
18. The Board found that Mr. Kiracofe testified that the fence will still allow for separation when out in their backyard. He noted that the neighbors enter and exit their property through that side of the yard.
19. The Board found that Mr. Kiracofe testified that, in his case, this is such a quiet street the fence it does not really have an impact but he could see in other locations that it could be an issue but he admitted that there are other houses in the neighborhood that may have similar issues because a number of other houses face Mulberry Knoll Road.
20. The Board found that Mr. Kiracofe testified that the neighbor's home is set back approximately 30 feet back from Mulberry Knoll Road which is why he is so close in the back.
21. The Board found that Mr. Kiracofe testified that he would be able to wash his side of the fence but he would not necessarily be able to do theirs without permission and he would consider it the neighbors' prerogative and responsibility. He noted that he would keep his side clean.
22. The Board found that Ms. Kiracofe testified that West Mint Place is a very quiet street.
23. The Board found that Ms. Kiracofe testified that all of the neighbors have submitted letters of support.
24. The Board found that Ms. Kiracofe testified that the Applicants and their neighbor wanted to have this increased level of privacy provided by the fence.
25. The Board found that Ms. Kiracofe testified that, if you are in your yard, you might as well bring your chair over.
26. The Board found that Ms. Kiracofe testified that the neighbor's deck is also facing that side of the property.
27. The Board found that Ms. Kiracofe testified that they have not experienced issues with trespassing.
28. The Board found that no one appeared in support of or in opposition to the Application.
29. 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 failed to meet the standards for granting a variance. The findings below further support the Board's decision to deny the Application.
 - a. The Applicants failed to demonstrate that the Property was unique and that the uniqueness of the Property has created an exceptional practical difficulty. The lot measures 150 feet wide by approximately 100 feet deep and is rectangularly shaped and shows no unusual shape. The existing dwelling is 17.4 feet from the side property line; which is a significant

distance from the neighboring property to the northeast. The Applicants seek to retain a fence that they constructed. The fence runs along the side yard of the Property and is adjacent to the rear yard of the neighboring property to the east. While the Applicants argued that the fence is needed for privacy, the Board was not convinced that there was some unusual condition related to the Property which has created an exceptional practical difficulty for the Applicants to reasonably use the Property. As noted by the Applicants, there are other similarly situated lots in the neighborhood which have side yards adjacent to rear yards. To the extent there is a privacy issue, the Board was not convinced that a fence built in compliance with the Code would not address those privacy concerns. The Applicants even lowered the height of the fence (albeit not the maximum fence height allowed by the Code) along the side yard. The Board notes that this denial does not prohibit the Applicants from installing a fence along their side yard but it does require that the Applicants install a fence that complies with the fence height requirements.

- b. The Applicants failed to prove that the Property could not be developed in strict conformity with the Sussex County Zoning Code. The Property is a rectangularly shaped lot. Rather than comply with the Code, the Applicants propose these variances so that they can retain a fence that exceeds the Code's fence height requirements. It is clear that the Applicants have chosen not to build the fence in strict conformity with the Code rather than developing the lot to comply with the Code's fence height requirements. While the height of the fence built in compliance with the Code may not be the height the Applicants prefer, the Applicants failed to demonstrate that they could not otherwise comply with the Code's fence height requirements. The Applicants are not entitled to have a fence that exceeds the fence height requirement. The Board was simply not convinced that the Applicants could not otherwise develop the Property in compliance with the Code. For these reasons, the Board finds that the Property could be developed in strict conformity with the Code and that the variances are not necessary to enable reasonable use of the Property.
- c. The Board finds that the Applicants are creating their own exceptional practical difficulty by proposing to retain a fence which does not meet the fence height requirement. The Applicants' decision to construct this fence at these heights is the reason for the need for a variance and has nothing to do with the size, shape, or condition of the Property. There is no unusual condition to the Property which has created this difficulty. The building envelope appears to otherwise be able to fit structures that would provide for the reasonable use of the lot, albeit perhaps in a location and design which differ from the Applicants' preference, without the need for the variance. The Board was not convinced that the variance requests were the product of a *need*. Instead, the variance requests appear to be the product of a *want* as the Applicants seek to retain the fence as constructed for purposes of convenience, profit, and / or caprice. Since the Applicants can develop the Property in compliance with the Sussex County Zoning Code, the need for the variance is something created by the Applicants' wants rather than an unusual physical condition relating to the Property. The Applicants have thus created their own exceptional practical difficulty.
- d. Since the variances are not necessary to enable the reasonable use of the Property, the Board also finds that the variances requested are not the minimum variances necessary to afford relief. Rather, the Board finds that no variance is needed to afford relief since the Property can be developed in compliance with the Sussex County Zoning Code.

- e. The Board also has concerns that the approval of this request would embolden others in the neighborhood to seek similar relief.

The Board denied the variance application finding that it failed to meet the standards for granting a variance.

Decision of the Board

Upon a motion to approve the variance application, which was duly made and seconded, the variance application was denied. The Board Members in favor of the Motion to approve the variances were Mr. Travis Hastings and Mr. Jordan Warfel. Dr. Kevin Carson, Mr. Jeffrey Chorman, and Mr. John Williamson voted against the Motion to approve the variance application. Pursuant to Board of Adjustment Rule of Procedure 6.5, three affirmative votes are needed to approve a variance. Since the Applicants failed to convince three Board members that the variance should be approved, the motion to approve the application failed and the variance application was denied. The reasons outlined above explain the reasons for the denial and these findings of fact affirm the Board's decision to deny the 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 February 6, 2023