

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

**IN RE: KELLY HALES**

**(Case No. 12397)**

Hearings were held after due notice on January 6, 2020 and on February 3, 2020. The Board members present were: Dr. Kevin Carson, Mr. Jeff Chorman, Ms. Ellen Magee, Mr. John Williamson, and Mr. Brent Workman.

Nature of the Proceedings

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

Findings of Fact

The Board found that the Applicant is requesting a variance of 3.6 feet from the 17.6 feet average front yard setback requirement for an existing dwelling. This application pertains to certain real property that is located on the west side of East Lagoon Road, approximately 511 feet north of Falling Point Road (911 Address: 30835 & 30843 East Lagoon Road, Dagsboro) said property being identified as Sussex County Tax Map Parcel Number 1-34-6.00-123.00 & 1-34-6.00-124.00. After a public hearing, the Board made the following findings of fact:

1. The Board was given copies of the Application, findings of fact for Case No. 12211; a survey of the property dated July 31, 2018, an older survey of the property, a survey of other lots in the area, an aerial photograph of the property, photographs, an affidavit of Blake Carey, Esquire, and a portion of the tax map of the area.
2. The Board finds that the Applicant had a previous application – Case No. 12211 which had a public hearing before the Board on October 1, 2018, and that the original Application was granted in part and denied in part. The portion of the previous application which was denied is the subject of this request. The Board finds that, before the Board can determine the merits of the variance, the Board must first determine if a substantial change of conditions has occurred or other considerations materially affecting the merits of the request have intervened. If there has not been a change in conditions, the Board cannot vacate the original decision and cannot entertain the merits of this application.
3. The Board found that the Office of Planning & Zoning received no correspondence in support of or in opposition to the Application.
4. The Board found that Kelly Hales was sworn in to give testimony about the Application.
5. The Board found that Ms. Hales testified that the variance is for an existing dwelling which was placed on the property by her contractor. She alleged that her contractor admitted in Court to moving the stakes.
6. The Board found that Ms. Hales testified that the dwelling cannot otherwise be developed as the dwelling is existing and it would be a financial burden to move the home. She would have to tear down the house in order to comply with the Code.
7. The Board found that Ms. Hales testified that the exceptional practical difficulty was not caused by the Applicant but by the contractor who moved the stakes.
8. The Board found that Ms. Hales testified that plumbing and electrical work is found under the pad and the walls are in the concrete.
9. The Board found that Ms. Hales testified that the Property is unique as it has a retaining wall behind the house and the house could not be placed farther back as it would cause the retaining wall to collapse.



10. The Board found that Ms. Hales testified that, since the prior application, she learned that she cannot move the house closer to the rear yard due to the structure of the retaining wall.
11. The Board found that Ms. Hales testified that the variance will not alter the essential character of the neighborhood and that it is farther back on the Property than the previous home.
12. The Board found that Ms. Hales testified that the variance requested is a minimum variance to afford relief and that the variance is only for one corner of the home.
13. The Board found that no one appeared in support of or in opposition to the Application.
14. The Board voted to keep the public hearing open and to reschedule a second hearing on this application for February 3, 2020. At that meeting, Ms. Hales appeared and was sworn in. She also came with her attorney Blake Carey, Esquire. Mr. Carey submitted exhibits for the Board to review.
15. The Board found that Mr. Carey stated that the letter from Matt Dunn states that moving the home into compliance would compromise the bulkhead and may result in destroying the bulkhead and the dwelling. Mr. Dunn opined that moving the house back 3.6 feet would cause significant load on the retaining wall and would collapse the wall, the house, or both. According to Mr. Dunn's letter, moving the house back would place 361,000 pounds of weight on the retaining wall.
16. The Board found that Mr. Carey stated that the Applicant did not have that information regarding the retaining wall until after the original request for a variance was denied and she sought information about moving the dwelling. The Board previously found that the house could be moved.
17. The Board found that Mr. Carey stated that a material change in the merits has occurred since the Applicant learned that the house cannot be moved.
18. The Board found that Mr. Carey stated that the Property has a significant slope in the rear yard.
19. The Board found that Mr. Carey stated that the retaining wall was there prior to the house.
20. The Board found that Mr. Carey stated that house was unilaterally placed on the lot by the builder as the Property was staked but the builder moved the stakes. The Applicant was subsequently engaged in litigation with the builder.
21. The Board found that Mr. Carey stated that that this information shows that there is a substantial change affecting the property.
22. The Board found that Mr. Carey stated that, if the house was moved closer to the retaining wall, the Applicant and neighbors would be put at risk and that the house would also be uninsurable if moved.
23. The Board found that Mr. Carey stated that the Property is unique as it abuts a canal and has a wedge shape.
24. The Board found that Mr. Carey stated that a significant part of the building envelope is unbuildable.
25. The Board found that Mr. Carey stated that the exceptional practical difficulty is created by the retaining wall; which was placed by a prior owner.
26. The Board found that Mr. Carey stated that, if the variance is not approved, the Property will likely be subject to foreclosure.
27. The Board found that Mr. Carey stated that the manufactured house on the lot previously was closer to the road than this house.
28. The Board found that Mr. Carey stated that the Property cannot be developed in strict conformity with the Sussex County Zoning Code.
29. The Board found that Mr. Carey stated that there is a known risk if the house is moved closer to the retaining wall.
30. The Board found that Mr. Carey stated that the retaining wall is not parallel to the roadway and, due to its placement, the building portion of the Property is very narrow.



31. The Board found that Mr. Carey stated that the dwelling is already in place and to move it closer to the retaining wall could compromise both the retaining wall and the dwelling.
32. The Board found that Mr. Carey stated that this exceptional practical difficulty lies in the issues with regard to the retaining wall and not caused by the Applicant.
33. The Board found that Mr. Carey stated that the Property has a steep decline in the rear yard and the topography was not created by the Applicant.
34. The Board found that Mr. Carey stated that the variance will not alter the essential character of the neighborhood as the dwelling is farther back from the property line than the previous dwelling and is a newer home that is aesthetically more pleasing than the home that was on the lot previously.
35. The Board found that Mr. Carey stated that, if the dwelling was moved into compliance and the retaining wall was to collapse, it would cause damage to the entire neighborhood.
36. The Board found that Mr. Carey stated that the variance requested is the minimum variance to allow the home to remain in its current location.
37. The Board found that Mr. Carey stated that the Applicant is in litigation with the builder over negligence claims.
38. The Board found that Ms. Hales testified that she purchased the Property 10-12 years ago and the retaining wall was on the property at that time.
39. The Board found that Ms. Hales testified that the rear yard floods up to the retaining wall.
40. The Board found that Ms. Hales testified that there is a gap between the edge of paving of the road and the front property line. According to Ms. Hales, the house is at least 17.6 feet from the edge of paving.
41. The Board found that Ms. Hales testified that they have not been able to occupy the house due to this issue but they have received no complaints about the location of the house.
42. The Board found that Ms. Hales affirmed the statements made by Mr. Carey as true and correct.
43. The Board found that no one appeared in support of or in opposition to the Application.
44. 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 there has been a substantial change of conditions or other conditions which materially affect the merits of the request have intervened.
  - a. The Board previously denied this variance request in the decision rendered in Case No. 12211 on grounds that the dwelling could be placed in strict conformity with the Sussex County Zoning Code. The Board also found that, since the house could be placed in strict conformity with the Code, the variance requested was not the minimum variance to afford relief. The Board also found that the exceptional practical difficulty was created by the Applicant since the house was placed in the wrong location.
  - b. Since that decision was rendered, the Applicant has consulted with professionals and determined that moving the house into compliance with the Code is not advisable due to the impact on the retaining wall.
  - c. The Property is developed with a retaining wall which separates the lower portions of the rear of the lot from the higher ground near the front of the lot. Notably, the survey indicates that the rear of the Property is in a flood zone. After the Board rendered its decision, the Applicant engaged in litigation with its builder and retained other professionals to investigate whether the house could be moved into compliance. The report rendered by Mr. Dunn was particularly insightful as it evidences that moving the house closer to

the retaining wall would threaten the integrity of both the wall and the house as it would place an added 361,423 pounds of pressure on the wall. Mr. Dunn also opined that the location of the house as it currently sits is safer than the location if moved. The Board also notes that the house, if moved, would likely be uninsurable. These issues were not known at the time of the prior hearing. Since these issues are now known, the reasons for denial may be fairly reconsidered.

- d. These findings confirm that there has been a substantial change in conditions or other considerations affecting the merits of the application have intervened.

45. 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, shape, and topography. The Property, though consisting of 3 lots, is wide but not deep. Furthermore, a significant portion of the rear yard is considered to be in the flood zone as is shown on the survey. The Applicant testified that the Property slopes significantly towards the rear yard and floods up to the retaining wall. These unique characteristics of this Property limit the buildable area available to the Applicant and have created an exceptional practical difficulty and unnecessary hardship for the Applicant who seeks to retain an existing dwelling on the lot. The Property is also unique because the retaining wall which separates the high ground in the front from the low ground in the rear is not parallel with the road thereby limiting an already shallow building envelope.
- 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 size and the buildable area thereof is limited due to its size, shape, and physical conditions. The Applicant seeks to retain an existing dwelling on the lot 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 reasonably sized, existing dwelling to remain on the lot. The Board is convinced that the shape and location of this structure 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. The Applicant did not create the unusual size, shape, and physical conditions of the Property. These conditions have resulted in a limited building envelope on the Property and the small building envelope has created the exceptional practical difficulty. The difficulty caused by the small size of the lot is exacerbated due to the fact that a portion of the rear yard is located in a flood zone and floods. The unique characteristics of the Property are clear when reviewing the survey. The Board is convinced that the unnecessary hardship and exceptional practical difficulty were not created by the Applicant but were created by the lot's unique characteristics. The Board also notes that the retaining wall, which limits the location of the house, was located on the Property by a prior owner and appears to have been located on the Property for many years.
- 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 existing dwelling will have no effect on the character of the neighborhood. The dwelling has been on the Property for quite some time without noted complaints in the record. No evidence was presented that the variance would somehow alter the essential character of the neighborhood. The lack of evidence is telling since, if the dwelling had somehow altered the essential character of the neighborhood, the Board would expect some evidence thereof. The Board also notes that only a corner of the dwelling encroaches into the setback area. The dwelling is also farther from the road than the prior house on the lot and there is a gap between the edge of paving of the road and the front property line so the encroachment is likely not as noticeable as it otherwise would be.

- 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 Applicant has demonstrated that the variance sought will allow her to retain a dwelling on the Property. No additions or modifications to the dwelling are proposed. The dwelling cannot be moved closer to the rear due to the flood zone and the retaining wall as previously noted.
- 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.

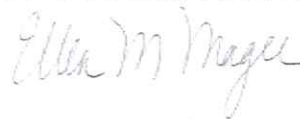
The Board granted the variance application finding that it met the standards for granting a variance.

#### Decision of the Board

Upon motion duly made and seconded, the Board found that there has been a substantial change of conditions or other conditions which materially affect the merits of the request have intervened. The Board Members in favor of the Motion to make this finding were Dr. Kevin Carson, Mr. Jeffrey Chorman, Ms. Ellen Magee, Mr. Brent Workman, and Mr. John Williamson. No Board Member voted against the Motion finding that there has been a substantial change of conditions or other conditions which materially affect the merits of the request have intervened.

Upon motion duly made and seconded, the variance application was approved. The Board Members in favor of the Motion to approve were Dr. Kevin Carson, Mr. Jeffrey Chorman, Mr. Brent Workman, and Mr. John Williamson. Ms. Ellen Magee voted against the Motion to approve the variance application.

BOARD OF ADJUSTMENT  
OF SUSSEX COUNTY



Ellen M. Magee  
Chair

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

Date May 5, 2020.