

MINUTES OF APRIL 1, 2019

The regular meeting of the Sussex County Board of Adjustment was held on Monday, April 1, 2019, at 7:00 p.m. in the County Council Chambers, 2 The Circle, Georgetown, Delaware.

The meeting was called to order at 7:00 p.m. with Chairman John Mills presiding. The Board members present were: Mr. Dale Callaway, Ms. Ellen Magee, Mr. John Mills, Mr. John Williamson, and Mr. Brent Workman. Also, in attendance were Mr. James Sharp, Esquire – Assistant County Attorney, and staff members Ms. Janelle Cornwell – Planning and Zoning Director, Ms. Samantha Bulkilvish, Planner, and Ms. Ann Lepore – Recording Secretary.

The Pledge of Allegiance was led by Mr. Mills.

Motion by Mr. Callaway, seconded by Ms. Magee, and carried unanimously to approve the revised agenda. Motion carried 5 – 0.

Motion by Mr. Workman, seconded by Mr. Callaway, and carried unanimously to approve the Minutes and Findings of Facts for the March 4, 2019, meeting. Motion carried 5 – 0.

Mr. Sharp read a statement explaining how the Board of Adjustment meeting is conducted and the procedures for hearing the case.

PUBLIC HEARINGS

Case No. 12278 – Indian River Volunteer Fire Company / TowerCo. New Cingular Wireless PCS, LLC seeks a special use exception to place a telecommunications tower, an interpretation of County Code, and variances from the maximum fence height for a proposed structure and from the maximum height for a proposed telecommunications tower (Sections 115-40, 115-179, 115-185, 115-194.2, 115-210 and 115-227 of the Sussex County Zoning Code). The property is located on the east side of Banks Rd. approximately 315 ft. north of Long Neck Rd. 911 Address: 25375 Banks Rd., Millsboro. Zoning District: GR. Tax Parcel: 234-23.00-287.00

Ms. Cornwell presented the case and stated that the Office of Planning and Zoning received no correspondence in support of or in opposition to the Application and zero mail returns. There have been changes made to the Application since its submittal and the only request before the Board tonight is the Special Use Exception to place the telecommunications tower.

Andrew Petersohn, Michael Moore, and David Hockey were sworn in to give testimony. Jonathan Jordan, Esquire, presented the Application on behalf of the Applicant.

Mr. Jordan referred to the exhibit booklets that were distributed to Board members prior to this meeting. Mr. Jordan stated that he would summarize the exhibit booklets; that the Applicant is proposing to construct a 150 ft. tall monopole which includes a lightning rod at property owned by the Indian River Volunteer Fire Company; that the proposed monopole will replace the 140 ft. tall lattice tower currently on site; that the communications equipment currently used by the Fire

Company would be migrated onto the proposed tower; that the proposed AT&T antenna would be compatible with the nationwide FirstNet system for emergency responders; that Tab 18 in the exhibit binders is a brief summary of the FirstNet system; that Tab 7 is the radio frequency report which shows that there has been a 47% bandwidth increase; that more people are using cell phones as their computer; that more than half of all households do not have a landline; that there has been a significant increase in cell phone use; that Tab 8 shows the existing coverage; that the purpose of this site is to offload excess calls from sites that are maxed out and to provide in building coverage to nearby properties; that 76% of all 911 calls are made from cell phones; that Tab 6 is an inventory of other structures; that there are three towers within a two-mile radius of this site; that one is the tower on this site; that the other two sites are too far west to satisfy the network improvements that are proposed; that, in addition, the two other sites are in proximity to existing AT&T sites and therefore will not work from a radio frequency standpoint; that Tab 14 shows photo simulations showing a negligible visual impact of going from 140 ft. lattice tower to a 150 ft. monopole; that the emissions from the proposed site would be less than 1.2% of maximum F.C.C. limits; that Tab 11 shows that the antennas would not interfere with other radio or appliances; that there are no F.A.A. issues with the proposed tower; that there will be lights every 50 ft. on the tower to comply with County Code; that the tower will be able to accommodate four platforms; that the tower will comply with the 50 ft. setback requirement and will have a 6 ft. tall fence; that there are no proposed signs for the site; that the Applicant will remove the tower if abandoned for six continuous months; that the proposed facility does not generate any noise or glare; that the traffic related to the tower is minimal; that the tower will generally require one maintenance trip per month; that there is no impact on water or sewer; that the Applicant tried to collocate on other structures first; that there will be room for two other carriers; that the tower will improve cell phone coverage in the area; and that the request for a special use exception will not substantially adversely affect the uses of adjacent or neighboring properties.

Michael Moore, Andrew Petersohn, and David Hockey affirmed the statements by Mr. Jordan as true and correct.

Mr. Moore testified that the tower is a standard tower which will support up to 4 carriers; that the tower is sturdier than the existing lattice tower; and that the proposed tower will have the ability to carry additional antenna which the current tower does not have the structural capacity to do.

Mr. Petersohn testified that cell phone traffic increases during the summer months and other towers are being exhausted so this tower is needed.

Mr. Hockey testified that the site is ideal because of the existing tower and the ability the new tower will have to increase service in the area; especially for the Fire Company.

Patrick Miller testified that he is the President of the Indian River Fire Company; that the Fire Company is in favor of this Application because the tower will provide additional coverage; that there are no complaints from neighbors; and that the Fire Company will not have to maintain the tower.

The Board found that one person appeared in support of and no parties appeared in opposition to the Application.

Ms. Magee moved to approve Application No. 12278 as the Applicant has met all the criteria for granting a Special Use Exception because the tower will not substantially affect adversely the uses of neighboring and adjacent properties and the Applicant met the standards of 115-194.2 of the Sussex County Code.

Motion by Ms. Magee, seconded by Mr. Callaway, and carried unanimously that the **special use exception be granted for the reasons stated**. Motion carried 5 – 0.

The vote by roll call; Mr. Workman – yea, Mr. Williamson – yea, Mr. Mills – yea, Ms. Magee – yea, and Mr. Callaway – yea.

Case No. 12274 – Bob Brooks seeks variances from the front yard setback requirements for proposed structures. (Sections 115-42 and 115-182 of the Sussex County Zoning Code). The property is located on the west side of Barney Ln., approximately 952 ft. south of Double Bridges Rd. 911 Address: N/A. Zoning District: GR. Tax Parcel: 134-19.00-343.00

Ms. Cornwell presented the case and stated that the Office of Planning and Zoning received no correspondence in support of or in opposition to the Application and zero mail returns. The Applicant is requesting a variance of 7.9 ft. from the required 30 ft. front yard setback for a proposed deck.

Bob Brooks and Andrew Goldberger were sworn in to give testimony about the Application. Mr. Brooks submitted exhibits for the Board to review.

Mr. Brooks testified that the request is for a variance for a proposed deck; that the cul-de-sac which fronts on the property does not exist but, on paper, protrudes into the property by 15 ft.; that the property is located at the end of the unbuilt cul-de-sac; that the property is unique due its irregular shape and size; that the lagoon is on the west of the property and Miller's Creek is to the south of the property; that the width of the property in the front is 63 ft. but narrows to 34.45 ft. wide in the rear; that the property cannot otherwise be developed in strict conformity with the Sussex County Zoning Code because the property is burdened by the physical conditions beyond the control of the Applicant; that the size and shape of the property restrict the construction of a typical house plan similar to others nearby; that the Applicant originally wished to purchase a mobile home but the lot size and restrictions did not allow for a plan that was suitable; that this was not created by the Applicant but by a 1967 subdivision plan when the lot was created; that the lot is under 10,000 square feet; that it will not alter the essential character of the neighborhood; that the request is only to regain use of the area of property removed by the proposed cul-de-sac; that the request is for less than 8 ft. and the proposed cul-de-sac encroaches 15 ft. onto the Applicants property; that the Applicant submitted some pictures to show the surrounding area; that

the property is serviced by public sewer and well water; that the well further restricts the building envelope; and that the house will be placed on pilings.

Ms. Cornwell stated that a 5 ft. variance from the required 30 ft. front yard setback for the steps will also be required.

The Board found that no one appeared in support of or in opposition to the Application.

Ms. Magee moved to approve Variance Application No. 12274 as the Applicant has met all 5 criteria for granting a variance.

Motion by Ms. Magee, seconded by Mr. Workman, and carried that the **variances be granted for the reasons stated**. Motion carried 5 - 0.

The vote by roll call; Mr. Workman – yea, Ms. Magee – yea, Mr. Mills – yea, Mr. Williamson – yea, and Mr. Callaway – yea.

Case No. 12286 – David & Doris Taylor seek variances from the corner front yard and front yard setback requirements for proposed and existing structures (Sections 115-34, 115-182, 115-183, and 115-185 of the Sussex County Zoning Code). The property is located on the west side of Mary Ave. approximately 89 ft. south of Beach Ave. 911 Address: 102 Mary Ave., Dewey Beach. Zoning District: MR. Tax Parcel: 334-23.06-83.00

Ms. Cornwell presented the case and stated that the Office of Planning and Zoning received no correspondence in support of or in opposition to the Application and two mail returns. The Applicants are requesting a variance of 16.7 feet from the thirty (30) feet front yard setback requirement for the existing dwelling, a variance of 16.3 feet from the thirty (30) feet front yard setback requirement for the existing house, a variance of 15.3 feet from the thirty (30) feet front yard setback requirement for the proposed vestibule, a variance of 18 feet from the thirty (30) feet front yard setback requirement for the proposed steps, a variance of 14 feet from the thirty (30) feet front yard setback requirement for the existing deck, a variance of 5.7 feet from the fifteen (15) feet corner front yard setback requirement for the existing house, and a variance of 4.4 feet from the fifteen (15) feet corner front yard setback requirement for the existing house. For clarity, Mary Avenue is considered the front yard and Pepper Avenue is considered the corner front yard.

Elizabeth Zando and David Taylor were sworn in to give testimony about the Application.

Ms. Zando testified that the property is located in the area called North Indian Beach; that the area has a lot of non-conforming properties; that pictures were submitted to the Board of some of the surrounding properties; that the Applicants are requesting a variance to build a vestibule in the front of the house to increase energy efficiency and to provide protection from weather; that the second request is for a variance to put a roof on in an existing porch; that the property unique

because it is a double-lot and is surrounded by non-conforming older homes; that it was not created by the applicants as they purchased the property with the house already non-conforming; that he is asking for a minimal variance to allow for some protection from inclement weather; and that the variances will not alter the essential character of the neighborhood as there are many non-conforming homes in the area.

Mr. Taylor testified that this area is mostly vacation homes and that he is one of the few full-time residents; that this request will not impact the neighborhood; that the edge of pavement matches the street line; that there have been no complaints or traffic concerns; that Pepper Avenue is a foot path and Mary Avenue is the primary road.

Ms. Cornwell advised the Board that the side yard setback is 5 feet due to the fact that the lot is an undersized lot. As such, no variance is needed for the porch on the side of the home.

The Board found that no one appeared in support of or in opposition to the Application.

Mr. Callaway moved to approve Variance Application No. 12286 as the Applicant has met all five standards for granting a variance.

Motion by Mr. Callaway, seconded by Ms. Magee, and carried unanimously that the **variances be granted for the reasons stated**. Motion carried 5 – 0.

The vote by roll call; Mr. Workman – yea, Ms. Magee – yea, Mr. Mills – yea, Mr. Williamson – yea, and Mr. Callaway – yea.

Case No. 12287– Boys & Girls Club of Delaware, Inc. seeks a special use exception to use a manufactured home type structure as a classroom (Sections 115-23 and 115-210 of the Sussex County Zoning Code). The property is located on the southwest side of Oak Orchard Rd. approximately 379 ft. southeast of John J. Williams Hwy. (Rt. 24). 911 Address: 31550 Oak Orchard Rd., Millsboro. Zoning District: AR-1 Tax Parcel: 234-29.00-69.06

Ms. Bulkilvish presented the case and stated that the Office of Planning and Zoning received two letters in support of and none in opposition to the Application and zero mail returns. The Applicant is requesting a special use exception to use a manufactured home as a classroom.

Erica Kennedy and Mildred Charnick were sworn in to give testimony about the Application.

Ms. Charnick testified that the classroom has been in use on the Property for a few years; that the Applicant is actively fundraising to replace the manufactured home with a permanent structure; that fifty children are using this classroom on a daily basis; that the 100 children use the main building daily; that there is a current waiting list of 30 – 40 children; that the Applicant provides before and after school programs, summer camp, homework help to students, sports

programs, and a resource center for families; that the original special use exception was granted in 2008 and was renewed in 2013; that there have been no complaints about the building; that the Applicant is trying to buy additional land; that children in the neighborhood use the facility; and that the facility benefits the neighborhood.

Ms. Kennedy submitted additional letters of support.

The Board found that no one appeared in support of or in opposition to the Application.

Ms. Magee moved to approve Application No. 12287 for the special use exception for a period of five (5) years.

Motion by Ms. Magee, seconded by Mr. Callaway, and carried unanimously that the **special use exception be granted for a period of five (5) years for the reasons stated**. Motion carried 5 – 0.

The vote by roll call; Mr. Workman – yea, Ms. Magee – yea, Mr. Mills – yea, Mr. Williamson – yea, and Mr. Callaway – yea.

Case No. 12288 – Mark DiIenno seeks a variance from the front yard setback requirement for a proposed structure on a through lot. (Sections 115-42, 115-182, and 115-185 of the Sussex County Zoning Code). The property is a through lot located on the northeast side of South Dr. and the west side of 4th St. approximately 200 ft. south of Midway Dr. in the Tru-Vale Acres Subdivision. 911 Address: 505 South Dr., Rehoboth Beach. Zoning District: GR. Tax Parcel: 334-13.00-87.00

Ms. Cornwell presented the case and stated that the Office of Planning and Zoning received no correspondence in support of or in opposition to the Application and zero mail returns. The Applicant is seeking a variance of 7.6 feet from the average front yard setback requirement of 23.6 feet from 4th Street for the proposed garage.

Mark DiIenno was sworn in to give testimony about the Application.

Mr. DiIenno testified that he is seeking the variance from the 4th Street side of the property; that the property is a narrow, through lot; that this is an irregular shaped lot because it is not parallel with the neighboring properties; that the property consists of less than 10,000 square feet; that the garage is needed to keep his car out of the elements; that he is unable to scrape ice due to shoulder problems; that he bought the property in its existing condition; that the garage is in proportion with the neighborhood; that he is placing a manufactured home on the lot; that the lot was previously improved by a singlewide manufactured home; that the lot is currently empty; that the carport will double as a porch; that it cannot otherwise be developed for a garage without the variance; that it was not caused by the Applicant as he purchased the property as is; that it will not alter the essential character of the neighborhood but will be in keeping with other dwellings; that the average setback

is 23.6 ft. and the request is for 7.6 ft and is the minimum to make the buildings work on this property; that the property is serviced by public water and public sewer; that the original plan was to place a larger dwelling and garage on the property but after receiving the survey, the Applicant reduced the size of the dwelling and garage and therefore, it is a minimum request to afford relief; that he has access to both streets but he has not applied to DelDOT for an entrance permit; that the carport will be used for his car and a sitting area; and that there is 14 ft. from the property line to edge of pavement on South Drive and 4th Street.

Cindy and Stan Sakowski were sworn in to give testimony about the Application. Mr. and Mrs. Sakowski had questions about the placement of the driveway and the carport. After reviewing the survey, they indicated that they support the application.

The Board found that two (2) parties appeared in support of the Application and no parties appeared in opposition to the Application.

Mr. DiIenno testified that the carport will be attached; and that, if only one entrance permit is granted, he will access the garage through the carport.

Mr. Callaway moved to approve Variance Application No. 12288 as the Applicant has met all five standards for granting a variance.

Motion by Mr. Callaway, seconded by Mr. Williamson, and carried unanimously that **the variance be granted for the reasons stated**. Motion carried 5 – 0.

The vote by roll call; Mr. Workman – yea, Ms. Magee – yea, Mr. Mills – yea, Mr. Williamson – yea, and Mr. Callaway – yea.

Case No. 12289 – Michael P. Strunk seeks variances from the side yard and rear yard setback requirements for proposed and existing structures (Sections 115-25, 115-182, and 115-185 of the Sussex County Zoning Code). The property is located on the east side of Woodland Cir. approximately 378 ft. south of Dogwood Dr. within the Angola by the Bay Subdivision. 911 Address: 34124 Woodland Cir., Lewes. Zoning District: AR-1. Tax Parcel: 234-12.17-69.00

Ms. Cornwell presented the case and stated that the Office of Planning and Zoning received one letter in support of and none in opposition to the Application and zero mail returns. The Applicant is requesting variances of 6 ft. from the required 20 ft. rear yard setback for the deck that is being converted to an addition and variances of 0.2 ft. from the required 5 ft. rear yard setback for two existing sheds. A variance of 0.5 ft. from the required 10 ft. side yard setback on the north side for the existing house and a variance of 6.3 ft. from the required 20 ft. rear yard setback for the existing house are also needed but those variances can be handled administratively since a certificate of compliance was issued for the dwelling.

Mr. Michael Strunk was sworn in to give testimony about the Application. Mr. Strunk submitted a letter of support from the Angola by the Bay HOA. Mr. Strunk testified that the home on Woodland Circle is currently a vacation home but he and his family are moving and the home will be the full-time residence; that an addition is necessary to make it comfortable for the entire family; that he purchased the home in November 2016; that the property is located in Angola by the Bay; that the home was built in 1979 by a prior owner; that the property is a double lot but the house does not meet setback requirements; that he only recently learned of the existing encroachments; that the addition has been designed so that the only portion that needs a variance is the master bedroom addition; that most of the addition will be built within the setbacks and will be built towards the center of the lot; that the addition cannot be constructed in the other direction; that the HOA has approved the design and advised the Applicant to apply to Sussex County for the necessary variances; that no variance is needed for the sheds as they will be removed; that neighbors support the variance requests; that variances requested are the minimum variances to afford relief; that the uniqueness of the property is that it is a shallow lot under 10,000 sq. ft. with setbacks of 30 ft. on the front, 20 ft. in the rear, and 10 ft. on each side creating a very small building footprint; that it cannot otherwise be developed because of the placement of the current home; that this practical difficulty was not created by the Applicant but by the original owner when they built the home in 1979; that it will not affect the essential character of the neighborhood as there are many homes with reduced rear yard setbacks; and that the improvements will increase property values in the area.

Errol Gambler and Virginia Ritchie were sworn in to give testimony about the Application.

Mr. Gambler, who owns Lot 67, testified that he has no objection; and that approval of the variance will not affect him.

Ms. Ritchie, who owns Lot 71, testified that she is in favor of the Application and the improvements will increase property values in the area.

The Board found that two (2) parties appeared in favor of the Application and no parties appeared in opposition to the Application.

Mr. Workman moved to approve Variance Application No. 12289 as the Applicant has met all five standards for granting a variance.

Motion by Mr. Workman, seconded by Ms. Magee, and carried unanimously that the **variance be granted for the reasons stated**. Motion carried 5 – 0.

The vote by roll call; Mr. Workman – yea, Ms. Magee – yea, Mr. Mills – yea, Mr. Williamson – yea, and Mr. Callaway – yea.

ADDITIONAL BUSINESS

Consideration of Request for Rehearing for Case No. 12225 – Old Orchard Ventures, LLC requests a special use exception to operate a convalescent home, nursing home, and/or home for the aged (Sections 115-23 & 115-210 of the Sussex County Zoning Code). The property is located approximately 1,000 ft east of Old Orchard Rd. and approximately 1,000 ft south of New Rd. with access off Old Orchard Rd. 911 Address: N/A. Zoning District: AR-1. Tax Parcel: 335-8.00-25.01

Ms. Cornwell presented the Consideration for Request for Rehearing Case No. 12225 – Old Orchard Ventures, LLC. Ms. Cornwell stated that a request for rehearing Case No. 12225 was submitted in writing and a response was also received from the Applicant stating its position regarding the rehearing; that both submissions were provided to Board members two weeks ago in the packet for tonight's meeting; and that it is now for the Board to consider if there is cause for a rehearing per the Rules and Procedures that the rehearing of the Application should be considered.

Mr. Williamson recused himself from the discussion and decision as he was not part of the original hearing on this Application.

The Board discussed the case.

Mr. Mills asked if the letter dated February 11, 2019, was the complete request. Ms. Cornwell confirmed that was the complete request submitted. Mr. Mills stated that he did not see anything specific that states there was a mistake, inadvertent surprise, excusable neglect, or newly discovered evidence.

Mr. Sharp recited the five elements for establishing newly discovered evidence and he stated that the Board's rules do not allow for oral argument or testimony and that the Board's decision on the motion is based on the written submissions to the Board.

Mr. Workman stated that a fair and correct decision was made for the Application.

Motion by Ms. Magee, seconded by Mr. Callaway, and carried unanimously that the **request for the rehearing of Case No. 12225 be denied for the following reasons.**

- The motion states that there was not sufficient time to review the Applicant's written submissions, but no such evidence is specifically identified in the motion.
- The rules do not require submissions of exhibits prior to the hearing and the Board is not required to leave the record open after a hearing.
- The motion cites no evidence to be presented to the Board.

- Delaware Law is clear that on rehearings on grounds of newly discovered evidence are disfavored and movants must establish five (5) elements in order to obtain a new hearing on these grounds.
- They have the burden of proving that this evidence came to their knowledge since the hearing; the knowledge could not have been used at the hearing; it is so material and relevant that it will probably change the result if a new hearing was granted; it is not merely cumulative or impeaching in character; it is reasonably possible that the evidence will be produced at the hearing. They have not met this burden.

Motion carried 4 – 0.

The vote by roll call; Mr. Workman – yea, Ms. Magee – yea, Mr. Mills – yea, and Mr. Callaway – yea.

Discussion of Subpoena Process

Mr. Mills stated that he was disappointed that no one showed up in response to the recently issued subpoena and said that the County should probably deny future permits for that applicant.

Mr. Sharp stated that the County has a “Clean Hands” ordinance and it deals with the refusal to grant building permits, zoning approvals, special use exceptions and variance requests; that the ordinance is specific to certain obligations such as property taxes, capitation taxes, water and sewer connection, front footage and/or usage charges, application fees, permit fees, including building permits, building code and inspection fees, interest, penalties, court costs and/or attorney’s fees if applicable to a default in any of the above listed obligations; that the Board has a limited scope of its authority under Delaware Code; that the Board has the right under County Code to issue subpoenas; that, if there is no response to the subpoena, the Board would have to go to court to compel that and leave the record open; and that process could take many months.

A brief discussion took place regarding the subpoena process and possibly changing the permit process to make homeowners aware of the required setbacks.

Meeting was adjourned at 8:35 p.m.