

## **MINUTES OF APRIL 15, 2019**

The regular meeting of the Sussex County Board of Adjustment was held on Monday, April 15, 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 Mr. Jamie Whitehouse – Planning Manager, 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 Mr. Workman, and carried unanimously to approve the revised agenda. Motion carried 5 – 0.

Motion by Mr. Callaway, seconded by Ms. Magee, and carried unanimously to approve and confirm the revised Minutes and Findings of Facts from the January 28, 2019, meeting for Case No. 12259. Motion carried 4 – 0. Mr. Williamson was not present at the January meeting and abstained from voting.

Motion by Mr. Callaway, seconded by Mr. Workman, and carried unanimously to approve the Minutes and Findings of Facts for the March 18, 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. 12291 – John & Colleen Girouard** seek a variance from the front yard setback requirements for proposed structures. (Sections 115-34, 115-182 and 115-185 of the Sussex County Zoning Code). The property is located on the east side of Hassell Ave. Ext., approximately 346 ft. south of Hassell Ave. in the Bay View Park Subdivision. 911 Address: 34978 Hassell Ave., Ext., South Bethany. Zoning District: MR. Tax Parcel: 134-20.11-25.00

Mr. Whitehouse 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 the 18 ft. variance from the required 30 ft. front yard setback for a proposed dwelling.

John and Colleen Girouard were sworn in to give testimony about the Application. James A. Fuqua, Esquire, presented the Application on behalf of the Applicant. Mr. Fuqua distributed exhibit booklets to Board members.

Mr. Fuqua stated that the Application is for an 18 ft. variance from the 30 ft. front yard setback

requirements for an existing lot; that the lot is made up of lot 79 and half of lot 80 in the second addition to Bayview Park; that Bayview Park is an older subdivision; that the Applicants have a contract to purchase the lot and they intend to remove the existing home and replace it with a new home; that the existing home is non-conforming and is located 8.5 feet from Hassell Avenue Ext. at its closest point; that the proposed home would be set approximately 3.5 ft farther back than the existing home; that the dwelling will meet all other setback requirements; that Bayview Park is an older subdivision where homes are being replaced with larger, modern homes; that the uniqueness of this lot is the location; that the property is the next-to-the-last lot on Hassell Avenue Extended; that it borders Cedar Pond on the east and wetlands and the bay are located to the west; that the survey shows the depth of the lot is 94 ft. on the north and 74 ft. on the south but there is a bulkhead that goes across the rear of the lot and a sizeable portion of the lot is unbuildable due to flooding; that a sizeable portion of the rear yard is actually in Cedar Pond; that the actual building area is only 77 ft. on the north and 63 ft. on the south; that one-third of the lot is zoned MR which requires lots to be 10,000 square feet; that this lot is a non-conforming lot at only 8,497 square feet and the portion of the lot above water is only about 7,000 square feet; that the 30 ft. front yard setback was designed for lots of 10,000 square feet and applying it to a lot of only 7,000 square feet would create a hardship for reasonable use; that the variance would not affect the essential character of the neighborhood as it would be similar to other homes in the neighborhood; that the dwelling will be similar to other homes in the neighborhood; that the exceptional practical difficulty was not created by the Applicant; that the lot was created as part of the original subdivision prior to the adoption of the Sussex County Zoning Code; that the new setback will be greater than that of the original home and will reduce a non-conformity; that the Board previously granted a variance in Case No. 10065 on February 25, 2008, for Lot 78, which is the lot adjacent to the south; that the Applicants' lot is even more unique than Lot 78; that the proposed front yard setback will be similar to other lots in the neighborhood; that it is a minimum variance request to enable reasonable use of this property; that the property is required to have two off-street parking spots; that the Applicants will guarantee four off-street parking spots to avoid blocking entrance to the neighboring home; that the dwelling will be constructed on pilings; that the Applicants will keep cars off Hassell Avenue Extended; and that the parking issue is not relevant to the variance application.

Mr. Girouard affirmed the statements by Mr. Fuqua as true and correct.

Mr. Fuqua stated that the land may have eroded since 1960; and that no variances are needed for the steps or HVAC system.

Mr. Girouard testified that they wish to build a home with 4-5 bedrooms and between 3,500 – 4,000 square feet; that the house is still being designed; that they are trying to have first-floor living; that, if the front yard setback requirement was met, the house would be built where the rear of the house is located and the house would be taller and out of character for the neighborhood; that the house will have a two-car garage with an additional two parking spots for guests; that there is flooding in the rear; and that there is about 10 ft. from edge of pavement of Hassell Avenue Extended to the property line.

The Board found that two people appeared in support of the Application and three people in opposition to the Application.

Michael Wigley, Susan Wigley and John Hendrickson were sworn in to give testimony in opposition to the application. Mr. Wigley submitted drawings for the Board to review.

Mr. Wigley testified that he and his wife own Lot 78 / Parcel 26 which is the property to the south of the Applicants' property; that they recognize that a variance is needed for the Applicants' property but the size of the variance could be reduced; that they purchased their lot in 2007; that Hassell Avenue Extended dead-ends at their lot; that Hassell Avenue Extended is 30 feet wide and most modern roads are 50 feet wide with a cul-de-sac; that they obtained a variance for the original home on their property but, when they rebuilt their home 2 years ago, they built within required County setbacks; that they are architects; that the Applicants' lot is shallower than their lot but the Applicants can design a nice home on their lot; that the Applicants could build a home consisting of 4,200 square feet with 5 feet side yard setbacks and a 20 foot front yard setback; that he does not oppose the pool but the pool should not be the reason for the hardship; that most houses in the neighborhood do not have pools; that their building envelope is 3,171 square feet and the Applicants' building envelope is 3,714 square feet with a 20 feet front yard setback; that they want to make sure that emergency vehicles would have access to their house; that cars have been parked in Hassell Avenue Extended in front of the Applicants' home; that there are wetlands on the other side of the road so Hassell Avenue Extended cannot be expanded in that direction; that the Applicants could request a variance of 10 ft. instead of 18 ft. and be able to build the house they want; that Hassell Avenue Extended is only 14 feet wide paved and is difficult to turn around; that he wants the Applicants to have adequate off-street parking; that a front yard setback of 20 feet would give cars room to turn around more safely; that public sewer is available but there is well water on site; that, in his proposal, he made some adjustments to the Applicants' design; that he prefers a 10 feet side yard setback but a 5 feet side yard setback is a better solution because it provides a greater front yard setback; and that the objection is based on the fact that this request is not the minimum variance request to afford relief.

Mr. Hendrickson testified that he is the vice-president of the Board of Directors for Bay View Park; that most of the lots in Bayview Park were created in the late 1950s and 1960s; that the right-of-way has a 99 year lease with the State; that the lots in the neighborhood have odd angles; that trash trucks have to back down the street; that he is an architect; that a 14 feet wide road is not sufficient for a turn around; that his main concern is life-safety issues; that he agrees that it would difficult to fit a home in compliance with the setback requirement; that all lots in Bayview Park are unique and oddly shaped; that most lots are less than 10,000 square feet; that there are older residents in the neighborhood and ambulances and emergency vehicles need to be able to move around; that, every time a variance is granted for Bay View Park, it sets a precedent; and that there are wetlands to the west.

Mr. Callaway moved to table Application No. 12291 to allow Board members time to review the opposition exhibits. Mr. Callaway withdrew his motion.

Mr. Fuqua stated that there are narrow streets in the neighborhood; that the parking requirements are two off-street parking spots but the Applicant will commit to four off-street parking spots as a condition of approval; that the opposition is imposing a design on the Applicants even though they obtained their own variance; that there is a difference between the two homes; and that the view of the bay is to the south.

Mr. Girouard testified that he would lose views of the bay if the 20 foot front yard setback was imposed but he agrees that the minimum variance to afford relief is not about the view.

Mr. Callaway moved to table Application No. 12291 until the May 6, 2019, meeting.

Motion by Mr. Callaway, seconded by Mr. Workman, and carried unanimously that the **Application be tabled until the May 6, 2019, meeting.** 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. 12292 – John & Constance Norman** seek variances from the side yard setback requirements for proposed structures. (Sections 115-25 and 115-183 of the Sussex County Zoning Code). The property is located on the east side of Wilson Ave., approximately 350 ft. south of Lincoln Dr. in the Cape Windsor Subdivision. 911 Address: 38797 Wilson Ave., Selbyville. Zoning District: AR-1. Tax Parcel: 533-20.18-155.00

Mr. Whitehouse 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 Applicant is requesting a variance of 4.9 ft. from the required 5 ft. side yard setback on the north side for proposed steps, propane tank, landing and HVAC.

Constance Norman was sworn in to give testimony about the Application. Ms. Norman submitted exhibit pictures and a letter of support to Board members. Ms. Norman testified that the property is located in Cape Windsor which is a former manufactured home park; that her lot is only 50 feet wide by 85 feet deep; that the Applicants suffered considerable flooding following Hurricane Sandy; that the Applicants looked to raise the prior home but it was not feasible; that the existing home is a 1978 doublewide home and the steps and HVAC system are located in the side yard; that the structures were in this location when they purchased the lot; that the proposed home will be 4 ft. wider than the current home making it A.D.A. compliant and will accommodate an elevator; that the house will be 1,567 sf.; that the house cannot be moved 4 ft. to accommodate the steps, landing, propane tank, and HVAC due to the placement of the Delmarva Power transformer in front of the home which restricts parking on that side of the lot; that the Applicants are trying to preserve green

space and parking areas; that there will be room for off-street parking under the home and the proposed location of the house will afford additional off-street parking; that the streets are too narrow to park along the streets; that their neighbor supports the Application; that the neighbor's home is 5 feet from the property line and the steps encroach into the setback area; that other homes in the neighborhood are similar and other variances have been granted; that the prior house has been removed; that the house will have a 10 feet tall concrete block foundation; that it was not created by the Applicant as she did not have control of the placement of the Delmarva Power transformer; that it will not alter the essential character of the neighborhood as it is consistent with other homes in the area and some green space will be reserved; that the Cape Windsor HOA has given their approval; and that it is the minimum variance requested to afford relief.

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

Mr. Callaway moved to approve Variance Application No. 12292 as the Applicants have met all five criteria for granting a variance.

Motion by Mr. Callaway, seconded by Ms. Magee, 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. 12293 – Concrete Building Systems of Delaware, Inc.** seeks a special use exception to use a manufactured home type structure as an office (Sections 115-114 and 115-210 of the Sussex County Zoning Code). The property is located on the northeast corner of Old Racetrack Rd. and Brick Manor Rd. approximately 970 ft. west of 2nd St. 911 Address: 9283 Old Racetrack Rd., Delmar. Zoning District: HI-1 Tax Parcel: 532-20.00-12.01

Ms. Bulkilvish 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.

Todd Stephens was sworn in to give testimony about the Application. Mr. Stephens testified that the manufactured home serves as the corporate headquarters for a number of companies that he owns; that he purchased the Property in 2007; that his businesses are growing; that the site was previously used as an industrial site with 2 older trailers; that he removed the trailers in 2012-13; that he purchased the existing structure from Hale Trailers and the unit is built to last; that he had 26 employees in 2007 and now he has 90 employees; that he spoke with neighbors and they are happy with the improvements to the Property; that the unit will not substantially affect adversely the uses of adjacent and neighboring property as it has been landscaped and looks like a permanent building; that the unit is a vast improvement to the buildings that were on the property when purchased by the Applicant; that he would like to construct a permanent office building but there are no plans at this

time to build a permanent building; that the building has handicap accessibility; and that the unit is not out of character for this type of business. Mr. Stephens submitted photographs of the property when purchased by him and the current building.

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

Ms. Magee moved to approve Application No. 12293 for the special use exception for a period of five (5) years because the unit will not substantially affect adversely the uses of neighboring and adjacent properties.

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. 12294 – CleanBay Renewables, LLC** seeks a variance from the maximum height requirement for a proposed structure (Sections 115-25 and 115-179 of the Sussex County Zoning Code). The property is located on the southwest corner of Dupont Blvd. (Rt. 113) and Breasure Rd. 911 Address: N/A. Zoning District: AR-1. Tax Parcel: 133-6.00-123.00 (portion of)

Mr. Whitehouse 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 33 ft. from the 42 ft. height requirement for a proposed structure.

Kristi Shaw was sworn in to give testimony about the application. Demetrios Kaouris, Esquire, presented the Application on behalf of the Applicant. Mr. Kaouris submitted exhibit booklets to the Board.

Mr. Kaouris stated that a conditional use was approved by Sussex County Council for CleanBay Renewables, LLC, to take chicken litter and turn it into natural gas and phosphorous products to be shipped out west to augment soils; that the process uses cutting-edge technology; that the Applicant seeks a height variance; that, originally, the entire building was to be at the height of 75 ft. tall and is the reason for the variance request; that a new design has been submitted and only a 40 ft. portion at the rear of the building will be 75 ft. tall and the remainder of the building will comply with County Code height restrictions of 42 ft.; that the building will be 178 feet long; that the west side of the building will be taller; that the west side of the property is farther from Route 113 and is closer to the borrow pit operation on nearby lands; that the process takes sludge and creates phosphorus; that the height is necessary to house the equipment necessary for the process of recycling the chicken litter; that the building is designed to resemble agriculture buildings; that, since the 75 ft. portion of the building is on the west side of the property, it will have a lesser visual impact from Rt.

113; that the tank used for recycling the litter is 52.5 ft. tall and the additional 22.5 ft. is needed to house the structure that supports the tank and for the crane on top of the tank; that the tank will be enclosed for aesthetic reasons; that most of the neighboring property is used either commercially or agriculturally; that the area has industrial uses as well; that the property is in a unique location being adjacent to Rt. 113 and an asphalt plant; that there are some residential properties to the north so one purpose for this variance is to minimize the visual impact to those residents; that it cannot otherwise be developed without the enclosed nutrient tank if this variance is not granted; that they are growing a landscape buffer; that this is the technology that exists and is needed to recycle the chicken litter; that the variance will not alter the essential character of the neighborhood as it is mostly agricultural and commercial; that the standard tank is 52 feet tall and is necessary for the use of the site for this purpose; that the variance will not be detrimental to the public welfare and will not impair the uses of neighboring and adjacent properties; and that the plans have been changed to make only a portion of the building at 75 ft. therefore, meeting the minimum variance to afford relief requirement.

Ms. Shaw affirmed the statements by Mr. Kaouris as true and correct.

Ms. Shaw testified that she is the director for environmental and regulatory affairs with CleanBay Renewables; that they use the nutrient recovery technology from a company called Ostara; that the technology is used to recover the phosphorous out of water after the manure goes through the anaerobic digestive process; that the phosphorous and nitrogen is made into a product called struvite and will be shipped out to the Midwest; that the process involves a reactor and a certain amount of headspace is necessary to allow the struvite to form and then fall out into the bottom of the reactor; that the structure is proprietary and the Applicant has no control over its size; that the water after it has been treated moves out through the top; that the City of Chicago wastewater plant uses this technology; that the process pulls nitrogen and phosphorus and turns it into crystal form; that the additional space for the crane is necessary to properly utilize the tank; that the product goes from the bottom of the tank to the top and is gravity fed; that the crane is needed for maintenance of the system; that this technology is different from AgriCycle which is used by Perdue; that this system pulls the methane out to be used as renewable natural gas; that this is a key part of the process both environmentally and financially; that the process produces 3 main products 1) Struvite, 2) natural gas, and 3) soil conditioner; that the facility will process approximately 90,000 tons of chicken litter per year from Sussex County; and that the Applicant worked with an architect to design the facility look like a barn.

Mr. Kaouris stated that the facility will not affect the nearby airport.

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

Ms. Magee moved to table Application No. 12294 to allow time for the Board members to review the exhibits submitted at this meeting.

Motion by Ms. Magee, seconded by Mr. Workman, and carried unanimously that the **Application be tabled until the May 6, 2019, meeting.** 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. 12295 – Whiskey Ridge Shooting Preserve** seeks a special use exception to operate a rifle or pistol range (Sections 115-23 and 115-210 of the Sussex County Zoning Code). The property is located on the east side of Parker Rd. approximately 0.75 miles northwest of E. Line Rd. 911 Address: 38149 Parker Rd., Millsboro. Zoning District: AR-1 Tax Parcel: 333-15.00-37.00 (portion of)

Ms. Bulkilvish 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 special use exception to operate a rifle or pistol range.

Janet Rae Kansak and Joseph John Kansak were sworn in to give testimony about the Application.

Mrs. Kansak submitted exhibits to the Board. Ms. Kansak testified that Whiskey Ridge Shooting Preserve has been in operation since 1990 and is licensed through the State of Delaware Natural Resources – Division of Fish and Wildlife; that the nearest residence on Parker Rd. is 1,440 ft. away with 960 ft. of heavy woods separating the residence and firearms range; that the nearest residence on Fireman’s Rd. is 1,500 ft. away with 100 ft. of heavy woods and 300 ft. of hedgerow separating the residence and firearms range; that the nearest residence on Bethel Rd. is 2,400 ft. with 1,200 ft. of heavy woods separating the residence and firearms range; that the range is constructed with a U-shaped berm approximately 20 ft. in height which enhances safety by preventing any rounds from leaving the area; that the berm is constructed to reduce noise similar to berms along major highways; that the nearest dwelling in front of the berm opening is approximately 1.3 miles away located on the Millsboro Highway; that, in season, 105 acres of corn grows on the property which acts to further reduce sound travel; that the targets are cardboard and are picked up on completion of shooting; that concealed carry classes are conducted at this location as approved by Delaware State Police and the Delaware Attorney General; that they have a security company and the range started as a way to give classes to employees about weapon safety and use; that the range was not open to the public and they considered it a private range; and that they have a license for trap shooting.

Mr. Kansak testified that, because he had State licensing, he was unaware that he also needed a special use exception from the County; that a recent complaint and a call from the Planning and Zoning Department made him aware that he needed to apply for the special use exception from the County; that concealed carry classes are held once a month; that the range is open to the public for trap and skeet shooting; that the range holds up to 14 shooters at one time; that classes are held from 10 a.m. to 4 p.m. and most of the class time is classroom training; that after each session they pick up the brass from the range; that the site has 190 acres and they lease additional acreage for the preserve;



and that he spoke to his neighbors and they have no complaints.

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

Lloyd Behney and Jeffrey Behney were sworn in to give testimony in opposition to the application. Mr. Lloyd Behney submitted an exhibit to the Board documenting best management practice for shooting ranges.

Mr. Lloyd Behney testified that he wants to know what the lead clean out schedule is for the shooting range; that the berm sits partially on wetlands and the concern is about cleaning the lead and controlling the run off to prevent a leeching problem; that there is an EPA standard for best range practice which tells you have to manage the range and what type of soil is needed; that he is concerned about groundwater contamination; and that he only opposes if the site is not maintained and cleaned up to those standards.

Mr. Jeffrey Behney testified that he is also concerned about the lead remediation and clean-up; that he has operated a range for 15 years and the soil has to be processed; that his main concern is that 20 years of lead is not contaminating the ground water; and that he has no objection to the shooting range if the removal of lead is being managed correctly.

Mr. Kansak testified that he had the berm constructed by A-Del Construction with clay on the bottom, then 5 ft. of crushed concrete covered with blacktop, and the berm on top; that the berm was constructed just 2 or 3 years ago; that the lead is recycled; that he is willing to check into the lead with a consultant and bring that information to the Board; and that there is an irrigation system on the property for his crops and he has no wish to contaminate the water supply.

Ms. Magee moved to leave the hearing open for Application No. 12295 until June 17, 2019 to allow the Applicant to submit a plan and to leave the record open to allow the Applicant to provide a lead recovery plan for the rifle or pistol range.

Motion by Ms. Magee, seconded by Mr. Callaway, and carried unanimously that **the hearing remains open until June 17, 2019**. Motion carried 5 – 0.

### **Additional Business**

Ms. Magee asked for clarification regarding height variances and if they can be approved by the Planning and Zoning Director. Mr. Whitehouse stated that the Director can approve height variance up to 1 ft. but any variance request greater than 1 ft. must come before the Board of Adjustment for approval.

**Meeting was adjourned at 8:33 p.m.**