

## MINUTES OF DECEMBER 10, 2018

The regular meeting of the Sussex County Board of Adjustment was held on Monday, December 10, 2018, 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. Bruce Mears, Mr. John Mills, 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, Mr. Jamie Whitehouse – Planning Manager, and Ms. Ann Lepore – Recording Secretary.

The Pledge of Allegiance was led by Mr. Mills.

Motion by Mr. Mears 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 October 1, 2018. 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.

### **OLD BUSINESS:**

**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

Mr. Whitehouse presented the case which was tabled at the Board's meeting on November 5, 2018.

Mr. Sharp noted that the Office of Planning & Zoning received comments after the record was closed and those comments are not considered as part of the record but that the Board could re-open the record and re-advertise for a future hearing if necessary.

Mr. Workman stated that the record should remain closed. Mr. Mears and Mr. Callaway agreed.

The Board discussed the case.

Ms. Magee moved to approve the special use exception Case No. 12225 to operate a convalescent home, nursing home, and/or home for the aged because the proposed use will not substantially affect adversely the uses of adjacent and neighboring properties, seconded by Mr.

Workman. Motion carried 5 – 0.

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

### **PUBLIC HEARINGS**

**Case No. 12218 – Sam & Lyn Sloan** seek variances from the minimum lot width requirement and minimum lot area for existing and proposed lots (Sections 115-25, 115-194 and 115-211 of the Sussex County Zoning Code). The property is located on the northeast side of Pinewater Dr., approximately 700 ft north of Multiflora Dr. in the Pinewater Farm Development. 911 Address: N/A. Zoning District: AR-1. Tax Parcels: 234-17.12-5.00, 234-17.12-5.01, and 234-17.12-5.02

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 one mail return. The Applicant is seeking variances from the 150 ft. minimum road frontage requirement for 11 single family lots in a conservation zone and variances from the lot area requirement to allow single family lots of approximately 20,000 ft. The specific variances requested are as follows:

- A variance of 42.07 feet from the 150 feet minimum lot width requirement for proposed Lot 1;
- A variance of 22,283 square feet from the 43,460 square foot lot size requirement for proposed Lot 1;
- A variance of 41.44 feet from the 150 feet minimum lot width requirement for proposed Lot 2;
- A variance of 22,307 square feet from the 43,460 square foot lot size requirement for proposed Lot 2;
- A variance of 50 feet from the 150 feet minimum lot width requirement for proposed Lot 3;
- A variance of 20,878 square feet from the 43,460 square foot lot size requirement for proposed Lot 3;
- A variance of 41 feet from the 150 feet minimum lot width requirement for proposed Lot 4;
- A variance of 22,742 square feet from the 43,460 square foot lot size requirement for proposed Lot 4;
- A variance of 50 feet from the 150 feet minimum lot width requirement for proposed Lot 5;
- A variance of 21,910 square feet from the 43,460 square foot lot size requirement for proposed Lot 5;
- A variance of 50 feet from the 150 feet minimum lot width requirement for proposed Lot 6;

- A variance of 21,910 square feet from the 43,460 square foot lot size requirement for proposed Lot 6;
- A variance of 50 feet from the 150 feet minimum lot width requirement for proposed Lot 7;
- A variance of 22,000 square feet from the 43,460 square foot lot size requirement for proposed Lot 7;
- A variance of 53 feet from the 150 feet minimum lot width requirement for proposed Lot 8;
- A variance of 23,273 square feet from the 43,460 square foot lot size requirement for proposed Lot 8;
- A variance of 50.33 feet from the 150 feet minimum lot width requirement for proposed Lot 9;
- A variance of 19,193 square feet from the 43,460 square foot lot size requirement for proposed Lot 9;
- A variance of 54.91 feet from the 150 feet minimum lot width requirement for proposed Lot 10;
- A variance of 19,266 square feet from the 43,460 square foot lot size requirement for proposed Lot 10;
- A variance of 50 feet from the 150 feet minimum lot width requirement for proposed Lot 11; and
- A variance of 18,651 square feet from the 43,460 square foot lot size requirement for proposed Lot 11.

The Application was also sent to the County Administrator pursuant to §115-194(c)(4). Mr. Sharp reminded the Board that there are additional standards for this Application because the Property is in a Conservation Zone.

Sam Sloan and Lawton Myrick were sworn in to give testimony about the Application.

Mr. Sloan testified that the Property has been in his family since 1894; that the Property is owned by he and his siblings; that the Property was previously a farm; that Sussex County planned to bring sewer to the area; that they propose to subdivide the parcel to provide homesites with two lots per family member; that there is water and sewer in the area; that the Property is located between 2 subdivisions; that Herring Creek Estates lots consist of ½ acre; that he met with homeowners in Pinewater Farms and he has collected twenty letters of support and is in the process of obtaining more support letters from neighbors in Pinewater Farms about this property being annexed into that subdivision; that bringing public water to the site is not feasible; that public sewer will be coming to the area and there is an easement on this site and a pump station to be placed on the west side of the property.

Mr. Myrick testified that the land is unique as it is a 7.9 acres parcel of land sandwiched between two subdivisions – Pinewater Farms and Herring Creek Estates; that the lots in the two

subdivisions are between  $\frac{1}{2}$  and  $\frac{3}{4}$  acre; that the proposed subdivision will be consistent with the neighboring communities; that this property is a geographical oddity; that there is a large depressed area in the center of the site; that the Property cannot otherwise be developed without the variance because per Sussex County Code §115-194 (B)(1) any lot created after the adoption of this section shall contain a minimum lot with size of 150 ft. and be at least 1 acre in size unless central water and sewer are provided; that public sewer is being brought to the area but public water is unavailable; that it would be cost prohibitive to bring water to the site; that this was not created by the applicants, but by the easements for Sussex County Sewer system bisecting the property; that it will not alter the essential character of the neighborhood but will blend in as the neighboring subdivisions have lot sizes between 0.5 acres to 0.75 acres; that the proposed lots will measure .47 acres to .56 acres; that the variances requested are the minimum variances necessary to allow relief; that all 11 lots will have a minimum lot size of 20,000 sf and minimum lot width of 100 ft; ; that the cost to bring public water to the site would be in excess of \$300,000 and would be a hardship for the land owners; that Sussex County contacted the Applicants about public sewer easements on the Property and these easements have been recorded; that water quality will not be adversely impacted by the creation of this subdivision; and that providing public sewer will result in the removal of existing septic tanks and fields and will ecologically benefit ground water in the area.

Mr. Sloan testified that there is no public water in the neighboring subdivisions and that the Property was previously used as a borrow pit.

Mr. Myrick testified that the depressed area of the Property will likely be used for a stormwater management area and that Tidewater Utilities provides service in the area and the Applicants would have to apply to be part of Tidewater's service area.

Hans Medlarz, Sussex County Engineer, was sworn in to give testimony in support of the Application.

Mr. Medlarz testified that the Property will be part of the Herring Creek Sewer District; that there was no support for public water in the area except for Winding Creek Village; that Sussex County went to neighboring communities and did not receive enough petitions to run a referendum on public water; that the situation was created by Sussex County when they asked for two easements bisecting the property for the placement of the pump station; that Sussex County purchased adjacent land for a pump station; that the Applicant was cooperative even though it created an unfavorable situation for them; that public water is about 7,000 ft away from site; that there were not enough petitions from the subdivisions to even hold a referendum to consider bringing public water to the area; and that he confirms the granting of the variances will not adversely affect water quality or adversely impact tidal water bodies adjacent to the conservation zone.

Ms. Cornwell advised the Board that, if the Applicants obtain the variances, they will have to obtain permission from Pinewater Farms to be annexed into that community; and that site plan approval will also be required.

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

Mr. Mears moved, seconded by Ms. Magee, and carried unanimously to **table Case No. 12218 until December 17, 2018**. Motion carried 5 – 0.

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

**Case No. 12236 – Kelly Conway** seeks variances from the side yard setback and separation distance requirement for existing structures (Section 115-172 of the Sussex County Zoning Code). The property is located on the east side of Seafarer Rd., approximately 519 ft. south of W. Harbor Dr. 911 Address: 27339 Seafarer Rd., Millsboro. Zoning District: AR-1. Tax Parcel: 234-30.00-6.00-5735

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 seeks the following variances: a variance of 4.1 feet from the five (5) feet side yard setback requirement on the side adjacent to Lot 78 for an existing shed, a variance of 4.0 feet from the five (5) feet side yard setback requirement on the side adjacent to Lot 78 for an existing shed, a variance of 5.7 feet from the twenty (20) feet separation distance requirement between accessory structures and other manufactured homes within a manufactured home park for an existing shed and an existing dwelling on Lot 78, a variance of 12.1 feet from the twenty (20) feet separation distance requirement between accessory structures and other manufactured homes within a manufactured home park for an existing shed and an existing dwelling on Lot 78, a variance of 9.3 feet from the twenty (20) feet separation distance requirement between accessory structures and other manufactured homes within a manufactured home park for an existing deck and an existing dwelling on Lot 78, a variance of 7.1 feet from the twenty (20) feet separation distance requirement between accessory structures and other manufactured homes within a manufactured home park for an existing deck and handicap ramp and an existing dwelling on Lot 78, and a variance of 4.9 feet from the twenty (20) feet separation distance requirement between accessory structures and other manufactured homes within a manufactured home park for an existing handicap ramp and an existing dwelling on Lot 78.

Kelly Conway was sworn in to give testimony. Ms. Conway testified that the requests for variance are for a shed and for a handicap ramp to allow her mother access to the house; that her mother had a stroke; that the property is unique because it is narrow; that the position of the door does not allow for the ramp to be placed elsewhere on the property and, therefore, the property could not otherwise be developed; that this was not created by the Applicant as the shed was already on the property when the current owner bought it and the ramp is necessary for her mother who suffered a stroke; that the variances will not alter the character of the neighborhood and are consistent with surrounding properties; that the variances are the minimum variances requested to meet ADA requirements for the ramp and are minimum variance requests to allow shed to remain in its current location; that the structures do not affect the water views of neighbors; that the dwelling has been on

the lot for decades; that she purchased the home in 2017; that she received permits from White House Beach and Sussex County; that she relied on her contractor; and that the shed was placed on the lot by a prior owner.

Ms. Cornwell advised the Board that there is no side yard setback variance needed for the ramp because it can encroach 4 feet into the setback area but a variance from the separation distance requirement is needed for the ramp.

Ms. Conway testified that the prior owner placed the house on the lot and it has been there for decades.

During discussion it was discovered that an additional 6.5 ft variance for separation distance is needed for the house.

Ms. Conway testified that she spoke with the owner of Lot 78; that the shed can be moved but there is no other place to locate it on the lot; and that there is a back door to the house so the shed cannot be located in the rear yard.

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

Mr. Mears moved to approve Variance Application No. 12236 for all variances including the 6.5 ft separation distance variance for the dwellings for the following reasons:

1. Regarding the handicap ramp and deck
  - a. The uniqueness is the position of the door;
  - b. The Property cannot otherwise be developed because off the setback;
  - c. The variance will not alter the character of the neighborhood;
  - d. The variance is minimal variance request to make the handicap ramp work within ADA requirements;
2. Regarding the shed
  - a. The uniqueness of the property is that it was existing when the Applicant purchased the property;
  - b. The Property could not otherwise be developed because of the narrowness of the lot;
  - c. The exceptional practical difficulty was not created by the Applicant because she purchased it with the shed already there;
  - d. The shed will not alter the character of the neighborhood; and
  - e. It is a minimal variance request to afford relief to keep the shed in its existing location.

Motion by Mr. Mears, 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. Mears – yea, Mr. Mills – yea, and Mr. Callaway – yea.

**Case No. 12237 – BB & Pops, LLC** seek a variance from the front yard setback for a proposed structure (Section 115-82 of the Sussex County Zoning Code). The property is located on the east side of Sussex Hwy. (Rt. 13), approximately 624 ft. south of Seashore Hwy. (Rt. 404). 911 Address: 18761 Sussex Hwy., Bridgeville. Zoning District: C-1. Tax Parcel: 131-15.00-24.03

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 one mail return. The Applicants seek a variance of 55 ft. from the 60 ft. front yard setback requirement for a proposed structure.

Ken Christenbury was sworn in to give testimony. Rick Berl, Esquire, was present on behalf of the Applicant and presented the Application. Mr. Berl referenced the exhibit booklet which was submitted to the Board.

Mr. Berl stated that the Property is 3.9 acres in size but only 0.85 acre is buildable due to many factors; that the Property is located behind Sonic and McDonald's near Bridgeville; and that the Property is triangularly shaped.

Mr. Christenbury testified that the travel lane of Route 404 used to be adjacent to the Property but the travel lane was moved and at one point now there is over 200 ft. between the property line and the edge of pavement; that the area located between this property and Route 404 is owned by DelDOT and is used for stormwater management; and that the Applicant has reached out to DelDOT to try to purchase the adjoining property and was informed that it is not for sale.

Mr. Berl stated that the part of the Property adjacent to Route 404 is considered the front yard; that the longest property line is along Route 404; that part of the Property is considered wetlands; that there is a Tidewater well and surrounding safe zones on the Property; that Tidewater has 4 wells on the lot taking up approximately 13,000 square feet; and that there is a wellhead protection ordinance which creates a safe zone around the wells and takes up area outside the Tidewater easement area.

Mr. Christenbury testified that part of the Property is used as an access road; that the Tidewater facility was operational when the wellhead protection ordinance was adopted; that, had the ordinance been in effect when the Tidewater easement was granted, the easement area would have needed to be larger; that there are limited development options due to the wellhead area; that there is a tax ditch taking about 80 feet; that the access road will be used to access the site; that he doubts DelDOT will grant access off Route 404; and that there is a gas station, Sonic, and McDonalds nearby.

Mr. Berl stated that less than 1 acre of the Property is developable; that the property is unique

due to its arrowhead shape and encumbrances; that the Property cannot be developed without this variance because the buildable area is reduced by the setbacks, the Tidewater well and safe zone, tax ditch, and easements; that the area is a commercial area; that this was not created by the applicant but by the uniqueness of this property; that the variance will not alter the essential character of the neighborhood as it is mostly commercial; that it is a minimal variance to make this a viable property; and that the 5ft. setback would be similar to other commercial setbacks in the area.

Mr. Christenbury affirmed the statements by Mr. Berl as true and correct. Mr. Christenbury submitted a calculation of encumbrances of this property to the Board showing that only .85 acre could be built on without this variance. Mr. Christenbury testified that the wetlands mitigation area is within the tax ditch; that he did not double dip in his calculations; and that the Property is likely to be used for mini-storage.

Mike Svaby was sworn in to give testimony. Mr. Svaby testified that he represents the State of Delaware and the State of Delaware who owns the adjacent property has no objection to the Application.

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

Mr. Workman moved to approve Variance Application No. 12237 for the requested variance for the following reasons:

1. The size and shape of the lot make it unique;
2. The variance is necessary to enable the use of the property;
3. The variance will not alter the essential character of the neighborhood as it is commercial; and
4. This is a minimum variance that will afford relief.

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

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

**Case No. 12238 – Patrick Kintz** seeks a special use exception for a private garage (Sections 115-23 and 115-210 of the Sussex County Zoning Code). The property is located on the east side of N. Old State Rd., approximately 1,643 ft. north of E. Hudson Pond Rd. 911 Address: 10353 N. Old State Rd., Lincoln. Zoning District: AR-1. Tax Parcel: 230-19.00-106.03.

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 seeks a special use exception for a private garage for more than 4 automobiles and with floor area of more than 900 square feet.

Jennifer and Patrick Kintz were sworn in to give testimony.

Mr. Kintz testified that he has an existing pole barn and would like to add an addition to it to house his family recreational vehicle; that the existing pole barn is too small to accommodate the recreational vehicle; that the Property consists of 3 acres and is long and narrow; that the Property has 200 feet of road frontage; that there is a railroad located nearby; that the addition will meet setbacks; that the land behind his property is wooded; that the dwelling is on the center of the lot; that there have been no complaints from neighbors; that it will not be used commercially; that it will not substantially affect adversely the uses of adjacent and neighboring properties as the garage is positioned in the rear of the property; that family owns adjacent property; that the garage will be used for personal use only; and that there are 4 doors on the building.

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

Ms. Magee moved to approve Application No. 12238 for the special use exception as it will not substantially affect adversely the uses of adjacent and neighboring properties.

Motion by Ms. Magee, seconded by Mr. Mears, 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, Ms. Magee – yea, Mr. Mears – yea, Mr. Mills – yea, and Mr. Callaway – yea.

**Case No. 12239 – Jason & Stacy Harshbarger** seek a special use exception to build a dwelling (stick built/modular) in a non-conforming mobile home park (Section 115-210 of the Sussex County Zoning Code). The property is located on the south side of S. Shore Dr. Ext., approximately 350 ft. southwest of Marina View Ct. 911 Address: 32 South Shore Dr., Bethany Beach. Zoning District: MR. Tax Parcels: 1-34-2.00-3.01 and 1-34-2.00-4.00.

Ms. Cornwell presented the case and stated that the Office of Planning and Zoning received eleven letters in support of and four letters in opposition to the Application and zero mail returns. The Applicant seeks a special use exception to build a stick built modular home in a non-conforming manufactured home park.

Ms. Cornwell advised the Board that an application for a building permit for a modular home was submitted in 2017; that the Property is part of the Simpson's Mobile Home Park which existed prior to the enactment of the Sussex County Zoning Code; that the modular homes are not permitted within manufactured home parks; that the permit for modular home was not accepted; that the Applicants then applied for a special use exception to place a modular home within a

manufactured home park; that she determined that the section of Code referenced by the Applicants was inapplicable to the situation; that the Applicants could place a manufactured home on the lot; that the Board later affirmed her determination but that decision was appealed to the Superior Court; that the Court affirmed in part and reversed in part; that the Court held that the Board did not review why prior special use exceptions to allow modular homes in the Park were granted; that the Applicants have submitted a new application under 115-210(A)(3)(i) which is defined as “a determination, in cases of uncertainty, of the district classification of any use not specifically named in these regulations; provided, however, that such use shall be in keeping with uses specifically permitted in the districts in which such use is to be classified”; that an example of a case where this section of code has been applied was a case where a property owner sought to use an electronic pool cover rather than a fence for his pool; that the cover would provide the same safety as a privacy fence but the cover was not addressed in the Code; that, in this instance, the Applicants can place a manufactured home on the lot; that the Code is clear that the Applicants cannot place a modular home on the lot; that she has reviewed the prior applications for similar relief approved by the Board in Simpson’s Mobile Home Park; that she believes that 115-210(A)(3)(i) was applied incorrectly in those cases; that the minutes only reference that the relief sought in those cases was for a special use exception and there was no reference to a determination being made; that the only issue before the Board in the previous cases was whether the use would substantially affect adversely the uses of neighboring and adjacent properties; that staff has concerns that approval of this application could result in a hybrid of a manufactured home park and a subdivision; that there are different regulations for manufactured home parks and standard subdivisions such as lot sizes and setback requirements; and that, for example, lots in an MR zoning district are required to be at least 10,000 square feet whereas a manufactured home park lot can be 5,000 square feet.

Mr. Sharp advised the Board that the Court’s decision was a finding that the Board was arbitrary and capricious for not investigating the 4 other cases where the Board allowed for a stick-built dwelling; that the Board’s failure to investigate why it had considered and approved virtually identical applications in the past is arbitrary and capricious; that the Court held that there was no Board decision on the applicability of 115-210(A)(3)(i) for the Court to review and that “the Board did not take any steps to determine why it had considered and approved virtually identical applications in Simpson’s Mobile Home Park in the past” and that “the Board should have, at the very least, figured out why it had done so” and that “the Board’s failure to do so was arbitrary and capricious”; that the Court affirmed the Board’s determination that a different section of Code was inapplicable; that copies of the 4 prior applications, minutes, and decisions and a copy of the transcript, application, and decision from the Applicant’s prior application were submitted as part of the record.

Stacy and Jason Harshbarger were sworn in to give testimony. Tim Willard, Esquire, was present on behalf of the Applicants, presented the Application.

Mr. Willard stated that the Applicants live in Pennsylvania and purchased a property in Simpson's Mobile Home Park; that the Applicants sought a building permit and were denied; that the Applicants believe there is a legal basis to allow for the proposed home; that the proposed home will not substantially affect adversely the uses of neighboring and adjacent properties; that the Park is zoned MR and is a non-conforming mobile home park; that 115-210(A)(3)(i) is a tortuously written section of Code; and that the fear about the impact of this decision on other MR mobile home parks is overblown.

Ms. Cornwell stated that there are 4 non-conforming manufactured home parks which are zoned MR.

Mr. Willard stated that the prior manufactured home was a dilapidated manufactured home on pilings; that the County says that they can replace a manufactured home; that the Code says that a use is abandoned if it is not used within 2 years; and that creates a Catch 22; that there are 4 other lots which are allowed to be used for modular or stick-built homes; that there are condominiums on neighboring properties; that the Court found that the Board failed to investigate the 4 prior applications and that the Board was on notice of those applications; that the Court found that the Board should have allowed the Applicants to file for a special use exception; that he argued that there was a section of the non-conforming code which allowed for alteration but the Court did not agree with that argument; that he assumes that former Planning & Zoning Director Lawrence Lank likely directed prior applicants to use 115-210(A)(3)(i); that it was not unusual for applicants to confer with Mr. Lank prior to filing for zoning approval; that 115-210(A)(3)(i) is an unusual section of code; that the Park has evolved; that MR zoning allows only for single-family homes; that the Board should have considered precedent; that he does not think the Director's memo to the Board makes sense; that the 4 prior cases in Simpson's Mobile Home Park all cite 115-210(A)(3)(i); that the Park is also known as Rock Turn Mobile Home Park; that in Cheswold Aggregates v. Town of Cheswold the Town proffered 2 interpretations of a statute and the Court held that the Town erred as a matter of law; that the Cheswold case points to well-held common law, that in cases of doubt, interpretations must be construed to favor the landowner; that the Golding case in 2012 was approved under 115-210(A)(3)(i) for a stick-built home on a lot adjacent to the Applicants' lot; that the Board has previously held that stick-built homes in the Park do not substantially affect adversely the uses of neighboring and adjacent properties; that the Board is a relief valve; that 115-210(A)(3)(i) is a "catch-all" provision; that a stick-built home in a non-conforming MR zoning district falls under 115-210(A)(3)(i); that the proposed use is in keeping with the permitted uses in an MR zoning district; that the lots are held under 99 year leases; that the Board was previously advised that 99 year leases are still considered leases; that there is case law which holds that lots held in renewable 99 year leases are actually held in fee simple; that these leases cannot legally change; that the Applicants removed the manufactured home and the pilings; that the home had been vacant for several years at that time; that Applicants were concerned that they would not be allowed to place a manufactured home on the lot; that, in 2005, a plot was recorded for the Park; that Mr. Sharp argued to the Court that the plot did not establish fee simple lots; that the plot was recorded and approved by the County; that the survey ensures

that there is at least 20 feet from all buildings in the Park; that the separation distance requirement protects the integrity of the Park and is analogous to setback requirements in a subdivision; that the proposed dwelling will be at least 20 feet from any neighboring dwelling; that the dwelling will be built to Sussex County Building Code standards and not HUD standards; that the dwelling will be placed on pilings since the home is in a flood plain; that the structure will be more hurricane resistant; that the house will be designed to provide more off-street parking; that the house will not substantially affect adversely the uses of neighboring and adjacent properties; that the house will improve property values; that the dwelling will be 2 stories tall; that neighbors in South Shore Marina allege that the house will block views; that the law does not protect views; that the Applicants do not intend to rent the house; that the immediate neighbors support the Application; that letters of support have been submitted into the record; that the pilings are still on the lot; and that the issue is whether the proposed home will affect the neighborhood and whether there is a legal means to approve the use.

Mr. Harshbarger testified as to the homes on neighboring properties and the pictures submitted to the Board; and that one neighboring lot was recently improved with a manufactured home on pilings.

Ms. Cornwell stated that a majority of the homes in the Park are manufactured homes.

Mr. Harshbarger affirmed the statements made by Mr. Willard as true and correct. Mr. Harshbarger testified that the Applicants want a two-story home which is more hurricane resistant; that the Applicants want room for more off-street parking; and that the footprint of the house will be 28 feet by 42 feet.

Ms. Cornwell stated the use is a non-conforming mobile home park and that a manufactured home can be placed on the lot.

Mr. Willard stated that he believes the Board is on firm legal ground to approve the Application based on precedent.

Ms. Cornwell stated that this is the only mobile home park in Sussex County where this type of request has been made; that there was a case where another mobile home park wanted a second stick-built home but was told by staff that they could not build a second stick-built home and that one of the stick-built structures was converted to a community center for the residents of the park.

Mr. Sharp stated that this situation differs from Cape Windsor and other similar communities which consist of fee simple lots and are not considered manufactured home parks.

Mr. Willard stated that the 99 year leases make it impossible to subdivide the Park unless someone purchased all of the lots.

Mr. Sharp stated that one of the options was that the landlord could, in theory, subdivide the Park but would need consent of all leaseholders.

Ms. Cornwell stated that there are different zoning requirements for a single family development versus a manufactured home park; that MR subdivisions are required to have minimum lot sizes of 10,000 square feet and setbacks of 30 feet for the front yard and 10 feet for the rear and side yards; that a manufactured home park can have lot sizes of 5,000 square feet with a separation distance requirement of 20 feet; that this park has front and rear yard setback requirements of 5 feet; and that the plot presented by the Applicants was for sewer service only and did not create a subdivision.

Mr. Willard stated that the Applicants proffer to meet the MR setback requirements.

Mr. Sharp presented a copy of the sewer easement survey along with a letter from Mr. Lank for the record. Mr. Willard did not object to its submission.

Mr. Harshbarger testified that they want to build vertically to allow for improved parking; and that the home will not exceed the County's height requirement;

Ms. Magee stated that the park was used as a fishing camp; that the County's housing needs have changed; and that the Board looks to the Code.

Mr. Harshbarger testified that he did not know when the 99 year leases began.

Mr. Sharp stated that he recalled that the 99 year leases started in the early 1990s.

Mr. Willard stated the leases are automatically renewing leases; that the Applicants' lease was recorded and was submitted as part of the briefing; and that he does not believe the Court has invited the Board to investigate its prior approvals.

Mr. Sharp stated that the Board has to undergo a two-part inquiry: 1) whether the Board has authority to grant the relief requested and 2) whether the proposed use substantially affects adversely the uses of neighboring and adjacent properties.

Mr. Willard stated that he searched for cases related to 115-210(A)(3)(i); that most cases which came up under 115-210(A)(3)(i) were related to this community; that the prior applications were accepted and the Board considered the applications under 115-210(A)(3)(i); that Mr. Lank did not deny the applications and there were no appeals; and that, based on his experience, it is likely that Mr. Lank guided prior applicants.

Mr. Harshbarger testified that a prior Board member previously asked whether a similar application could go forward and the question was forwarded to Planning & Zoning staff and the application was approved.

Mr. Willard stated that he appreciates the rigid application by the Director but that the floodgates have not opened with additional applications.

Mr. Harshbarger testified that there are 20 lots and 18 homes of which 4 are stick-built homes.

Ms. Cornwell stated that only 4 lots have stick-built homes and all other homes comply with the manufactured home park requirements.

The Board found that six people appeared in support of the Application. David DeCristo and Steven Golding were sworn in to give testimony.

Mr. DeCristo testified that he owns a 2 story home in the Park; that he received a special use exception for the home; that, when he learned about the need for a special use exception, he was upset and called Planning & Zoning; that he was told that a precedent had been set and that approval was a formality; that he also learned that the Park is located in a VE-9, rapid flood area where mobile homes would not comply with codes; that the proposed dwelling will improve property values and off-street parking; that he works in construction; that the inlet is nearby; that it is important to build a hurricane-resistant structure; that he was told that he could not place a manufactured home on the lot; that he has spoken with John Kerr who inherited the Park; and that Mr. Kerr's family owns nearby lots.

Mr. Mears stated that a VE-9 classification requires that a home be elevated 9 feet.

Mr. DeCristo testified that he used concrete pilings and built the home to protect against hurricanes.

Mr. Golding testified that he lives next door to the lot; that his home is a modular home approved by the Board; that the park's Board supports the Application; that the VE-9 classification places great limits on development in the Park; particularly with financing; that the Park suffers from high water and winds; that this is not a typical mobile home park; that he wants the best quality homes in the neighborhood; and that immediate neighbors support the request.

The Board found that three people appeared in opposition to the Application. Phil Boling and Terence Lynam were sworn in to give testimony.

Mr. Boling testified that he owns a townhouse in the South Shore Marina Condominium; that he purchased his unit in 2016; that his deck offers an unimpeded view of the water; that he

was told by his real estate agent that the views would remain unimpeded because the neighboring property was zoned as a mobile home park; that the views are main reason why he purchased his unit; that the Board previously granted 4 special use exceptions but South Shore Marina was not informed of those applications; that he is also speaking on behalf of the condominium association; that market values at the beach are highly affected by views; that the multi-story homes will affect the views of his unit; that the blocking of views will devalue neighboring property values; and that the proposed home will also adversely affect rental income associated with his townhouse.

Mr. Lynam testified that he owns a single-family house in the development; that he previously owned a townhouse nearby as well; that he bought the townhouse and sold it at a significant loss of \$285,000 in 2018; that he believes that the haphazard development of the Park contributed to the devaluation of his townhouse; that he was under the impression that the park was a mobile home park; that he received no notice of the prior applications; that the first home approved in 2005 was on a much larger lot; that the home approved in 2011 was a one-story home; that the home approved in 2012 was a one-story home; that the home approved in 2014 was a two-story home and substantially changed the neighborhood; that other owners in the Park are awaiting the Board's decision and will then seek a similar approval; that the use of the Park will change and this will change the character of the neighborhood; that he believes market value is based on the ability to see the water; and that blocking of views of the water will affect property values.

Ms. Magee stated that she would like to leave the record open to look into the prior applications.

Ms. Cornwell advised the Board that the Board has copies of the applications, minutes, and findings of fact for those applications

Mr. Callaway moved, seconded by Ms. Magee, and carried unanimously to **table Case No. 12239 until December 17, 2018.** Motion carried 5 – 0.

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

**Meeting was adjourned at 9:50 p.m.**