REVISED MINUTES OF JANUARY 28, 2019

The regular meeting of the Sussex County Board of Adjustment was held on Monday, January 28, 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. Bruce Mears, Mr. John Mills, and Mr. Brent Workman. Also, in attendance were Mr. James Sharp, Esquire – Assistant County Attorney, Mr. Vincent Robertson, 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. Callaway seconded by Mr. Mears and carried unanimously to approve the revised agenda. Motion carried 5 – 0.

Motion by Mr. Workman, seconded by Mr. Mears, and carried unanimously to approve the Minutes and Findings of Facts for November 19, 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.

PUBLIC HEARINGS

Case No. 12259 – Lois Lee Rehkamp seeks variances from the minimum road frontage requirement, minimum lot depth requirement, minimum lot area, front yard setback, side yard setback, and corner front yard setback requirements for existing structures (Sections 115-74 and 115-182 of the Sussex County Zoning Code). The property is located on the southeast corner of S. Bay Shore Dr. and Broadkill Rd. 911 Address: 2 S. Bay Shore Dr., Milton. Zoning District: B-1. Tax Parcel: 235-4.13-102.00

Mr. Sharp advised the Board that he had a conflict of interest and left the Chambers. Mr. Robertson served as the Board's attorney for this case.

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 seeking the following variances:

a. 26.04 ft. from the required 100 ft. lot depth for a commercial parcel in the B-1 zoning district for Proposed Lot 3. ~~1~~
b. 42.3 ft from the required 60 ft. front yard setback for an existing store on Proposed Lot 3.
c. 1,938 sf from the required 10,000 sf lot size for Proposed Lot 3.

d. 25.53 ft. from the required 100 ft. lot depth for a commercial parcel for Proposed Lot 3. ~~1~~
e. 94.49 ft. from the required 150 ft. lot width for a proposed lot fronting onto a numbered road on Proposed Lot 1.
f. 0.1 ft. from the required 15 ft. corner front setback for an existing dwelling for Proposed Lot 1.
g. 3,612 sf from the required 10,000 sf lot size for a dwelling in the B-1 zoning district for Proposed Lot 1.
h. 7 ft. from the required 10 ft. side yard setback on the southwest side for landing and steps on Proposed Lot 1.
i. 45.33 from the required 150 ft. lot width for a proposed parcel fronting a numbered road for Proposed Lot 3.

Lois Rehkamp was sworn in to give testimony. Shannon Carmean Burton, Esquire presented the Application on behalf of the Applicants.

Mrs. Burton stated that Ms. Rehkamp is the executrix of her mother, Marian Koehler's estate; that Ms. Koehler wanted the property to be subdivided after her death; that a number of variances are needed to subdivide the property; that it was originally two separate lots; that currently there is a retail store and a residential dwelling on the property; that the property is unique as it is a total of 14,449 sf and is a corner lot; that it cannot be developed into two lots without the requested variances; that this was not created by the Applicant as they are existing uses on the property and were inherited by Ms. Rehkamp; that the variances will not alter the character of the neighborhood as these uses are currently on the property; that the store for over 60 years and the dwelling for over 20 years; that there have been no complaints from neighbors; and that these are the minimum variances requested to maintain the uses of the property when subdivided.

Ms. Rehkamp affirmed the statements made by Mrs. Burton as true and correct.

The Board found that eight people appeared in support of and none in opposition to the Application.

Ms. Magee moved to approve Variance Application No. 12259 for all variances as they have met all the criteria necessary for granting a variance.

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

Mr. Sharp returned to Chambers and Mr. Robertson left.

Case No. 12256 – Enrico Lachmann seeks variances from the rear yard setback requirements for an existing structure (Sections 115-42 and 115-183 of the Sussex County Zoning Code). The property is located on the southwest corner of Oak Dr. and Magnolia Dr. in the Angola Neck Park subdivision. 911 Address: 22836 Magnolia Dr., Lewes. Zoning District: GR. Tax Parcel: 234-12.14-44.01

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 3.5 ft. and a 3.4 ft. variance from the required 10 ft. rear yard setback for an existing second-floor platform and steps.

Jason Lachmann was sworn in to give testimony.

Mr. Lachmann testified that there was confusion regarding the setback requirements as this is a second-floor structure; that, had it been steps to the first-floor, the steps could have been 5 ft. into the setback; that the neighboring lot to the rear is undeveloped and wooded; that the steps and platform provide second-floor access to the attic; that the deck measures 8 feet by 8 feet; that the uniqueness of the property is the corner lot; that it cannot be otherwise be developed as the steps are already in place; that it was not created by the applicant because they expected the builder to follow setbacks and thought they were in compliance; that it will not alter the essential character of the neighborhood and the neighboring properties are owned by family; that it is the minimum variance to request relief and bring the steps and landing into compliance; that no other changes are proposed; that the builder obtained the permit; that the encroachment was discovered after the construction as completed; and that the builder lives across the street.

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

Motion by Mr. Workman, seconded by Mr. Callaway, and carried **unanimously to table this case until the February 4, 2019 meeting.** 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. 12257 – Michael & Alexis Grosscup seek a variance from the rear yard setback requirement for a proposed structure (Sections 115-42 and 115-183 of the Sussex County Zoning Code). The property is located on the north side of Silver Fox Dr. approximately 194 ft. west of Fox Hall Rd. in the Fox Haven Subdivision. 911 Address: 33531 Silver Fox Dr., Frankford. Zoning District: GR. Tax Parcel: 533-11.00-532.00

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 a 4.4 ft. variance from the required 10 ft. rear yard setback for a covered porch.

Michael Grosscup was sworn in to give testimony.

Mr. Grosscup testified that he wishes to build a covered porch onto his home and he needs a variance to do so; that he purchased the home from Ryan Homes and was told he could build a covered porch; that the initial placement of the home would have allowed the covered porch to be built without a variance but the home was placed in a different location on the lot making a variance necessary; that the lot is unique because it is pie-shaped and there are non-tidal wetlands in the rear; that the property cannot otherwise be developed without a variance; that there are houses on either side so this is the only practical location for the covered porch; that the need for the variance was not created by the Applicant but by Ryan Homes due to the placement of the home; that Ryan Homes moved the house over 4 feet; that Ryan Homes admitted its error; that the variance will not alter the character of the neighborhood as there are a number of covered porches on other homes; that the porch will measure 10 feet by 12 feet and will be a covered porch; that the variance requested is the minimum variance necessary to afford relief; that the porch will not encroach into the wetlands; that the Applicants wanted the porch but did not want Ryan Homes to build it; that the porch has to be located in this location due to the orientation of the dwelling and location of sliders; that the porch will be located off the kitchen; and that the porch will be 7 feet from the rear property line.

Mr. Whitehouse stated that, if the porch will be 7 feet from the rear property line, a variance of 3 feet will be needed.

Mr. Grosscup testified that he is very comfortable with a variance of 3 feet; that Ryan Homes told him that the house was moved to improve the swale; that there is no tax ditch on the property; and that the steps will be located within the building envelope.

The Board found that one (1) party appeared in support of the Application and no parties appeared in opposition to the Application.

Mr. Mears moved to approve Variance Application No. 12257 for the following reasons:

1. The uniqueness of the lot is the irregular shape of the lot and it backs up to wetlands that cannot be developed;
2. The Property cannot otherwise be developed without this variance due to the irregular shape of the lot;
3. The exceptional practical difficulty was not created by the applicant as the builder moved the house too far to the left during construction;
4. The variance will not alter the essential character of the neighborhood as there are wetlands in the rear and will not encroach on neighbors; and
5. The variance requested is the minimum variance necessary to afford relief.

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

Case No. 12258 – Maranatha Church seeks a special use exception to use a manufactured home type structure as an office (Sections 115-80 and 115-210 of the Sussex County Zoning Code). The property is located on the west side of Sussex Hwy. (Rt. 13) approximately 0.29 mile south of Greenwood Rd. 911 Address: 12370 Sussex Hwy., Greenwood. Zoning District: C-1 Tax Parcel: 530-10.00-40.01

Mr. Whitehouse presented the case and stated that the Office of Planning and Zoning received one letter in support of and one letter of opposition to the Application and zero mail returns. The Applicant is requesting a special use exception to place a double-wide manufactured home type structure to use as an office for a period of five (5) years.

Michael Bell was sworn in to give testimony. Mr. Bell testified that the request is for a period of five years to place a manufactured home in the rear of the church as an office; that the Applicant purchased the unit from the State; that the church is growing and additional space is needed; that the unit will be placed to the rear of the existing church; that the unit measures 24 feet wide and is a lesser width than the current structure; that the unit is a 1995 model; that there are plans to obtain a larger property in the future; that it will have two offices and a bathroom; that there will be no kitchen facilities; that DNREC has approved the use; that the unit will provide a short-term solution; that it will be in use 3-4 days a week; that the unit will not substantially affect adversely the uses of adjoining and neighboring properties as the manufactured home will be placed in the rear of the church and is a lesser width than the current building; that the neighbor to the north of the property has no objection; that the unit will meet setback requirements; that the church will improve the condition of the unit; that there will only be 2 structures on the property as well as a portable storage pod; and that the church has received septic approval.

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

Ms. Magee moved to approve Application No. 12258 for a special use exception for a period of five (5) years for the church to place a double-wide manufactured home at this location to be used as an office because the special use exception will not substantially affect adversely the uses of adjoining and neighboring 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, Mr. Mears – yea, Ms. Magee – yea, Mr. Mills – yea, and Mr. Callaway – yea.

Case No. 12260 – Kevin W. Clear seeks variances from the front yard setback and side yard setback requirement for existing structures (Sections 115-25 & 115-185 of the Sussex County Zoning Code). The property is located on the south side of Daisey Rd. approximately 746 ft. east of Honeysuckle Rd. Address: 34582 Daisey Rd., Frankford. Zoning District: AR-1. Tax Parcel: 533-6.00-125.00

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 a 1.9 ft. variance from the required 40 ft. front yard setback for a pole building and a 1.7 ft. variance from the required 5 ft. side yard setback on the southeast side for an existing shed.

Kevin Clear was sworn in to give testimony. Mr. Clear testified that he hired Ready Building company; that the company staked the property but then went out of business; that another company was hired to complete the pole building; that the second company built based on the layout by the original company and it was discovered after the building was complete that it did not meet setbacks; that the pole building is too close to the front property line; that there was previously a 100 year old building on the site where the pole building was constructed; that the neighbors support the application; that the property is unique because it is long and narrow; that it could not otherwise be developed as the septic system is on the other side of driveway; that it was not created by the Applicant as he relied on the company he hired to follow setbacks and he was out of town working at time of construction; that it will not alter the character of the neighborhood as it already exists; that the building that is currently used as a run in for horses will be moved to be in compliance with setbacks so no side yard variance is needed; that there have been no complaints from neighbors; that it is the minimum variance to afford relief; that there is approximately 12 feet from the front property line to the edge of paving; that he has received no complaints about the building; and that the older building was 17 feet from the front property line.

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

Ms. Magee moved to approve Variance Application No. 12260 because all five standards for granting a variance have been met.

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

The Board took a ten (10) minute recess.

Case No. 12262 – TowerNorth Development, LLC seeks a special use exception to place a telecommunications tower (Sections 115-23, 115-194.2 and 115-210 of the Sussex County Zoning Code). The property is located on the west side of Sam Lucas Rd. approximately 476 ft. south of Cave Neck Rd. 911 Address: 25754 Cave Neck Rd., Milton. Zoning District: AR-1. Tax Parcel: 235-20.00-54.00

Mr. Whitehouse 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 a special use exception to place a telecommunications tower comprising of a 195 ft. monopole with 6 antennae on a concrete pad with associated fencing and equipment cabinets.

Shaun Paul, Paul Chan, and Dave Grigonis were sworn in to give testimony. Jonathan Jordan, Esquire presented the Application on behalf of the Applicant.

Mr. Jordan distributed exhibit booklets to Board members. Mr. Jordan stated that the request is for a 195 ft. monopole telecommunications tower on a 90 acre farm; that the Property is adjacent to Dogfish Head; that the tower will fill coverage gaps; that there are no towers within 2 miles; that the setback for the tower will be 235 ft. at a minimum from property lines; that an 8 ft. tall fence will be installed; that the tower will be lit every 50 ft. per County Code; that the tower will meet FAA regulations; that the tower will not have blinking lights; that a large portion of Milton, Delaware is not currently covered and this telecommunication tower would help fill all the gaps in service in that area; that AT&T will have antennas at the top of the tower with space for other carriers; that there is a tower two miles to the west and another two miles to the north currently satisfying the two mile radius between towers; that this tower would be in addition to the existing towers; that the minimum lot size for a telecommunication tower is one acre; that this tower will be placed on a 90 acre property; that a site plan has been submitted; that an FCC License and Electromagnetic report was included in the exhibit booklet; that, if the tower is out of commission for a period of six months it will be removed from the site; and that this use will not substantially affect adversely the uses of adjacent and neighboring properties.

Dave Grigonis and Shaun Paul affirmed the statements made by Mr. Jordan as true and correct.

Mr. Paul testified that, in addition to the new coverage this tower will provide, the tower will also alleviate the existing capacity issues to the surrounding sites.

Mr. Jordan stated the fence will be 7 feet tall.

Mr. Paul testified that AT&T collocates whenever possible but the other structures are either not feasible for this use or are already used by AT&T; that AT&T is building coverage to improve

service within Milton; that the closest tower is 2 miles to the west; and that the tower will be constructed to support future demand.

Mr. Jordan stated that the tower will be lit every 50 feet; that the tower will have monthly maintenance visits which will result in minimal traffic; and that the tower has no emissions, noise, or smells.

Ms. Cornwell advised the Applicant that this application is for the special use exception and that the Applicant will have to submit an application to request a variance for the tower height and for the fence height if the fence exceeds 7 feet.

Mr. Sharp advised the Applicant that the Code limits telecommunication towers to a height of 150 feet.

The Board found that seven (7) people appeared in support of and no parties appeared in opposition to the Application.

Ms. Magee moved to approve Application No. 12262 for a special use exception but noted that the Applicant will need to obtain a variance for the height of the tower via separate application.

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. Mears – yea, Ms. Magee – yea, Mr. Mills – yea, and Mr. Callaway – yea.

ADDITIONAL BUSINESS

Consideration of Request for Rehearing for Case No. 12188 –Allen Harim Foods, Inc. This case pertains certain real property located on the northwest corner of Pinnacle Way and Iron Branch Road (Route 331) (911 Address: 29984 Pinnacle Way, Millsboro); said property being identified as Sussex County Tax Map Parcel Numbers 2-33-5.00-14.00, 2-33-5.00-15.00, & 2-33-5.00-16.00.

Ms. Cornwell presented the Consideration for Request for Rehearing Case No. 12188 – Allen Harim Foods, Inc. Ms. Cornwell stated that Case No. 12188 focused on a request by Allen Harim to amend a condition of approval; that a request for a rehearing based on the rules and procedures of the Board of Adjustment was submitted within the timeframe set forth in the rules; that the Applicant was afforded an opportunity to respond to the request for the rehearing and this information has been provided to the Board; and that to allow for a rehearing there must be cause set forth in the rules.

Mr. Sharp stated that the Board rules allow for a rehearing if one of the following exists: 1) mistake, inadvertent surprise, or excusable neglect, 2) newly discovered evidence which by due

diligence could not have been discovered at the time of the original hearing, or 3) fraud, misrepresentation, or other misconduct of an adverse party. Mr. Sharp 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.

Ms. Magee recused herself from the discussion on this motion.

The Board discussed the case.

Mr. Mills stated that the motion should not be a vehicle to rehash arguments.

Mr. Workman agreed with Mr. Mills.

Mr. Mills stated that he did not see any newly discovered evidence.

Mr. Callaway agreed with Mr. Mills.

Motion by Mr. Callaway, seconded by Mr. Workman, and carried unanimously that the **request for the rehearing of Case No. 12188 be denied for the following reasons**.

- The Board has received from Charlotte Reid on behalf of other individuals, Keep Our Wells Clean, and Protect Our Indian River, a Motion for Request for Rehearing pursuant to Board Rule 18.1(a)(b)&(c). In this Motion, Movants have alleged that Case No. 12188 – Allen Harim Foods, LLC, should be reheard due to 1) "mistake, inadvertent surprise, or excusable neglect", 2) newly discovered evidence which by due diligence could not have been discovered at the time of the original hearing, and 3) fraud, misrepresentation or other conduct of an adverse party. Allen Harim Foods has submitted a written response to this motion.

- Regarding the claim that mistake, inadvertent surprise, or excusable neglect exists:

  - Delaware law is clear that a motion for rehearing is not a vehicle to rehash or more forcefully present arguments already made. Arguments that the Board erred in its decision is not a mistake that warrants a rehearing.

  - The Movants argue that the Board failed to address traffic concerns, risk of spills, and Brownfield site implications. Movants, however, make no allegation of a mistake of fact which would rise to the level of warranting a rehearing. Rather, Movants assert, more or less, that the Board made the wrong decision. These are arguments that were raised, or should have been raised, at the prior hearing.

- Movants also argue that the Applicant failed to present a DNREC permit issued on September 4, 2018, and that the Board's failure to consider this permit is a mistake. This argument, however, fails to recognize that the Board's record was closed after the public hearing on August 20, 2018. Even assuming that the permit was part of the record, the Movants' argument ignores the well-held principle that the Board is not a permitting agency and the Board is allowed to rely on permitting agencies to perform their statutory duties to safeguard the public. The Board's prior decision is clear that the Board will defer to DNREC the handling of wastewater from the site.

- Simply put, Movants' disagreement with the Board's decision does not constitute a "mistake" for purposes of a rehearing under Rule 18.1.

- The Movants also made no colorable or convincing argument as to the existence of excusable neglect or inadvertent surprise.

- Regarding the claim that newly discovered exists:

  - Delaware law is clear that rehearings on grounds of newly discovered evidence are disfavored and movants must establish five elements in order to obtain a new hearing on these grounds.

  - In this case, Movants alleged that they were not notified of the water reuse argument until the hearing and that they have evidence about Allen Harim's history of water reuse. Movants failed to convince the Board 1) that this evidence came to their knowledge since the hearing, 2) that the knowledge could not have been used at the hearing, 3) that it is so material and relevant that it would probably change the result if a new hearing was granted, 4) that it is not merely cumulative or impeaching in character, and 5) that it is reasonably possible that evidence will be produced at the hearing.

  - Similarly, the Movants' argument that the Applicant should have shared the Denali permit with the Board after the record was closed also fails to meet this exacting standard. As previously discussed, since the Board defers to DNREC on wastewater permitting issues, the existence of this permit is not so material and relevant that it will probably change the result if a new hearing is granted. Furthermore, in order for evidence to qualify as "newly discovered evidence" it must have been in existence and hidden at the time of the hearing; which was not the case here.

- Regarding the claim that fraud, misrepresentation, or conduct of the adverse party exists:

- Parties seeking relief under Rule 18.1(c) bear a "heavy burden" and must show the most egregious conduct involving a corruption of the Board's process itself. Movants have failed to meet this high standard.

- In the Motion, Movants make unsubstantiated claims that Allen Harim falsely claimed its intention to seek onsite spray irrigation approval. Movants also imply that Allen Harim will not abide by the Denali permit. These claims are unsubstantiated in the record and, to the extent the Denali permit is to be enforced, DNREC will be responsible for enforcement.

- Ultimately, Movants have failed to establish fraud or misrepresentation by Allen Harim.

- As discussed above, Movants' arguments are largely a rehash of arguments raised (or should have been raised) at the previous hearing and the Board is not convinced that the Movants have satisfied the conditions for granting a rehearing.

Motion carried 4 – 0.

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

Discussion regarding changing the order of old business on the agenda.

A brief discussion took place regarding the placement of Old Business items on the agenda and to move Old Business to the end of the agenda for each meeting, and to add Additional Business on all future agendas.

Meeting was adjourned at 9:04 p.m.