MINUTES OF NOVEMBER 4, 2019

The regular meeting of the Sussex County Board of Adjustment was held on Monday, November 4, 2019, at 6:00 p.m. in the County Council Chambers, 2 The Circle, Georgetown, Delaware.

The meeting was called to order at 6:00 p.m. with Chair Ellen Magee presiding. The Board members present were: Dr. Kevin Carson, Mr. Jeff Chorman, Ms. Ellen Magee, Mr. John Williamson, and Mr. Brent Workman. Also, in attendance were Mr. James Sharp, Esquire – Assistant County Attorney, and staff members Ms. Janelle Cornwell – Planning and Zoning Director, Ms. Jennifer Norwood – Planner, and Ms. Ann Lepore – Recording Secretary.

The Pledge of Allegiance was led by Ms. Magee.

Motion by Mr. Chorman, seconded by Mr. Workman, and carried unanimously to revise the agenda to move old business to the end of the 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. 12374 – J. Michael Yoder, James O'Bryan and Keith Martin seek variances from the road frontage requirement for proposed lots (Section 115-25 of the Sussex County Zoning Code). The property is located on the southwest corner of Staytonville Rd. and Webb Farm Rd. 911 Address: N/A. Zoning District: AR-1. Tax Parcel: 130-11.00-6.00

Ms. Cornwell presented the case and stated that the Office of Planning and Zoning received seven letters in support of and none in opposition to the Application and zero mail returns. The Applicant is requesting a variance of 77.12 feet from the 150 foot road frontage requirement for a proposed Lot 5 along Staytonville Road and a variance of 50 feet from the 150 foot road frontage requirement for a proposed Lot 4 along Webb Farm Road.

Ms. Magee recused herself from hearing and voting on this Application. Ms. Magee left Chambers.

J. Michael Yoder was sworn in to give testimony about the Application. Mr. David Hutt, Esquire, presented the Application on behalf of the Applicant and submitted an exhibit booklet to Board members.

Mr. Hutt stated that the property is located in the greater Greenwood area and fronts on both Webb Farm Road and Staytonville Road; that the property consists of approximately 17 acres; that the Applicants purchased the property in 2019; that the area is rural; that the property was originally subdivided by a previous owner with the intent of making 23 lots with an internal road that would have access to both Webb Farm Rd. and Staytonville Rd.; that the original subdivision created the unique shape of the lot; that the Applicants propose to create 5 lots; that the acreage could

accommodate the 5 lots but the Applicants are constrained by the shape of the lot; that the Applicants have met with neighbors to discuss the plan and they support the request; that the property is unique due to the odd shape; that, due to the uniqueness, the property cannot otherwise be developed; that the practical difficulty was not created by the current owners as they purchased the lot as is; that the entrances have developed lots on either side and therefore cannot be increased; that it will not alter the essential character of the neighborhood as it is largely residential and agricultural; that the use will be identical to the uses of neighboring properties; that the entrances will provide private access for two large proposed lots; that each of the proposed lots are greater than the minimum size of ¾ acre required by Sussex County; and that it is the minimum variance possible because of the developed lots on either side of the entrances.

Mr. Yoder affirmed the statements made by Mr. Hutt as true and correct.

The Board found that seventeen parties appeared in support of and none in opposition to the Application.

Ms. Cornwell stated that this is a major subdivision and that the site plan would be presented to the Planning and Zoning Commission for approval if approved by the Board of Adjustment for the requested variances. Another public hearing would be held regarding the subdivision.

Mr. Workman moved to approve Application No. 12374 as the size and shape of the lot make it unique and difficult to develop; that the variance is necessary to enable the use of the property; that it was not created by the Applicant; that it will not alter the essential character of the neighborhood; that the Applicant has the approval of his neighbors; and that it is the minimum variance to afford relief.

Mr. Workman moved, seconded by Dr. Carson, and carried unanimously that the **variances be granted for the reasons stated.** Motion carried 4 - 0.

The vote by roll call; Mr. Chorman – yea, Mr. Workman – yea, Mr. Williamson – yea, and Dr. Carson – yea.

Ms. Magee returned to Chambers.

Case No. 12376 – Frank T. English seeks variances from the front yard and side yard setback requirements for existing structures (Section 115-42 of the Sussex County Zoning Code). The property located on the east side of S. Bay Shore Dr. approximately 1 mile south of Bay Front Rd. 911 Address: 2806 South Bay Shore Dr., Milton. Zoning District: GR. Tax Parcel: 235-10.00-13.00

Ms. Cornwell presented the case and stated that the Office of Planning and Zoning received no correspondence in support of or in opposition to the Application and zero mail returns. The Applicant is requesting variances of 8.2 ft. and 3.9 ft. from the required 30 ft. front yard setback for

steps and a porch.

Laurie Bronstein and Paul Weber were sworn in to give testimony about the Application. Mr. Chad Meredith, Esquire, presented the Application on behalf of the Applicant and submitted photographs of the subject property and emails in support of the Application to Board members.

Mr. Meredith read an affidavit from Frank English, the previous owner of the property, and submitted the affidavit into the record.

Mr. Meredith stated that the second floor of the house is considered the first floor because the house is built on pilings; that other homes in the neighborhood are similarly situated; that the house was built in 1985; that trees may need to be removed; the property is unique as it is located along the Delaware Bay; that it is in a flood zone and there are dunes in the rear yard; that it cannot be otherwise developed as it was developed in 1985; that there have been no alterations to the exterior of the home since that time; that the Applicant hired a contractor to build the home; that the Applicant was unaware that the house was not in compliance with County Code until the recent sale; that it will not alter the character of the neighborhood as it has been in place for over 30 years; that it is the minimum variance to afford relief and for all the dwelling and its features to remain in the current location.

Ms. Bronstein testified that she is a real estate agent who focuses on Delaware beach properties; that she is familiar with the lot; that she represented Mr. English in the sale of the property; that Mr. English was stunned that a variance as needed; that the variances will have no adverse impact on the neighborhood; that there is no impact on the character of the neighborhood; that the septic system is located in the front yard; that the steps cannot be moved; and that there is a DNREC building restriction line in the rear of the property.

Ms. Bronstein affirmed the statements made by Mr. Meredith as true and correct.

The Board found that one person appeared in support of and none in opposition to the Application.

Mr. Chorman moved to approve Application No. 12376 as the exceptional practical difficulty was not created by the Applicant; that the lot is unique and it would be an extreme financial hardship to try to bring the dwelling into compliance with County Code; and that the variances will not alter the essential character of the neighborhood.

Mr. Chorman moved, seconded by Mr. Williamson, and carried unanimously that the **variances be granted for the reasons stated.** Motion carried 5 - 0.

The vote by roll call; Mr. Chorman – yea, Mr. Workman – yea, Mr. Williamson – yea, Dr. Carson – yea and Ms. Magee – yea.

Case No. 12377 – Steven H. & Michelle L. Hearn seek a variance from the minimum lot size requirements for a proposed lot (Sections 115-42 of the Sussex County Zoning Code). The property located on the east side of Bethel Concord Rd. approximately 0.19 Miles north of Airport Rd. 911 Address: 26183 Bethel Concord Rd., Seaford. Zoning District: GR. Tax Parcel: 132-2.00-339.00 (Portion)

Ms. Norwood 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 0.218 acres from 0.75 acre lot size requirement for a proposed lot.

Steven and Michelle Hearn were sworn in to give testimony about the Application.

Mr. Hearn testified that he would like to sell a lot from his property but the lot is too small; that he wants to keep it in line with the other lots on Bethel Concord Rd.; that the residual lands will be used for farming; that, if the lot was to be the full size of 0.75 acres, it would impede the farm operations to the rear; that the lot will be served by a well in the front yard and septic in the rear yard; that the neighboring lots are less than ¾ acre also; that the original subdivision was created by her father and not the Applicant; that the manufactured home on the lot will be replaced; that the farm is irrigated and the irrigation extends close to the proposed lot line; and that the Applicant currently farms up to the proposed lot line.

Ms. Hearn testified that the property is unique due to its shape and size; that it cannot otherwise be developed as it would extend 60 ft. into the farm operation to the rear; that the manufactured home has been on the lot for many years and was placed by a prior owner; that it would not alter the essential character of the neighborhood as it would be a similar size and shape as the surrounding lots; and that it is the minimum variance request to keep the lot lines uniform and not impede the farm operations in the rear.

The Board found that one person appeared in support of and none in opposition to the Application.

Dr. Carson moved to approve Application No. 12377 as the property is unique; that it has been existing and will not alter the character of the neighborhood; and that the variance is the minimum variance necessary to afford relief.

Dr. Carson moved, seconded by Mr. Chorman, and carried unanimously that the **variance be granted for the reasons stated.** Motion carried 5 - 0.

The vote by roll call; Mr. Chorman – yea, Mr. Workman – yea, Mr. Williamson – yea, Dr. Carson – yea and Ms. Magee – yea.

Case No. 12378 – Cellco Partnership d/b/a Verizon Wireless (Donna & Richard Harris) 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 east side of Hitch Pond Rd. approximately 0.29 miles north of Arvey Rd. 911 Address: 34401 Hitch Pond Rd., Laurel Zoning District: AR-1. Tax Parcel: 332-9.00-4.03

Ms. Norwood 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 for a cell tower.

Susan Manchel, Andrew Petersohn, and Matthew Graubort were sworn in to give testimony about the Application. Mr. John Tracey, Esquire, presented the Application on behalf of the Applicant.

Mr. Tracey stated that the special use exception request is for a 145 ft. tall monopole telecommunications tower with a 5 ft. tall lightning rod; that it is in an AR-1 district; that the area is used agriculturally; that the property is wooded and consists of 8.5 acres; that the special use exception had been previously granted but expired before the pole could be installed; that the Application is identical from the previous application except that there is a slight adjustment to the access road; that the tower will not create any RF interference; that the tower will meet FAA requirements; that the need for the tower still exists; that currently 57-58% of all homes use cell phones and no longer have landlines; that the tower will meet County Code with lights every 50 ft.; that the facility will be fenced in; that the nearest tower is approximately 3 miles away; that no variances are required and will meet all setback requirements; and that approving this Application will not substantially affect adversely the uses of adjacent and neighboring properties.

Mr. Petersohn testified that there is a gap in reliable coverage which this tower will help to fill; that he used propagation models for predicting coverage; that, if the special use exception is approved, this tower will help increase the coverage in this area; that the F.C.C. has specific standards and this facility will be well below the applicable limits; that emissions analysis show that this facility will emit 1.5% of the permitted emissions under the F.C.C. allowances; that there is no additional requirement from the FAA; and that there is no additional interference from the tower.

Mr. Graubort testified that he is a civil engineer; that this Application is almost identical to the Application which was approved in 2017; that the only change is a shift in the location of the tower on the property moving it closer to the agricultural operation to the north; and that there will be limited tree removal and trimming on the property to accommodate the tower because the tower will be located in an existing tree clearing.

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

Dr. Carson moved to approve Application No. 12378 as the Applicant has met the standards set forth in County Code 115-194.2 for a cell tower.

Dr. Carson moved, seconded by Mr. Williamson, and carried unanimously that the **special use exception be granted for the reasons stated.** Motion carried 5 - 0.

The vote by roll call; Mr. Chorman – yea, Mr. Workman – yea, Mr. Williamson – yea, Dr. Carson – yea and Ms. Magee – yea.

Case No. 12379 – Kenneth & Lorraine Burke seek a variance from the rear yard setback requirements for a proposed structure (Section 115-25 of the Sussex County Zoning Code). The property is located on the west side of Herring Reach Ct. approximately 568 ft. north of Inlet Breeze Dr. in the Bay Pointe subdivision. 911 Address: 23670 Herring Reach Ct., Lewes. Zoning District: AR-1. Tax Parcel: 234-18.00-662.00

Ms. Norwood 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 requesting a 3 ft. variance from the required 10 ft. rear yard setback for a screened porch.

Kenneth and Lorraine Burke were sworn in to give testimony about the Application.

Mr. Burke testified that the Application is to place a screened in porch over a deck that is already in place; that the deck will not be extended; that the property is unique as it is a small lot; that it cannot be otherwise developed for a screen porch without the variance; that the deck will not be extended farther; that the deck is 10 ft. X 14 ft.; that there is common ground to the rear of the property; that there is no room on either side of the dwelling to put a screened porch; that Ryan Homes built the dwelling and did not offer either deck or screened porch at time of building; that it will not alter the essential character of the neighborhood as there are many other screened porches and also some rear yard variances in the area; that the variance is a minimum to allow for the current deck to be screened in; and that the porch is needed for health reasons.

Mrs. Burke testified that she has medical issues which limits her exposure to sunlight and that is the reason they are requesting a screened porch; and that the rear yard receives a great deal of sunlight.

Mr. Burke testified that there have been 3 variances granted in the neighborhood for rear yard variances.

Gerald Geiebel and Daniel DiLoretto were sworn in to give testimony in support of the Application.

Mr. Greibel testified that he supports the request as it will not alter the character of the

neighborhood; and that the porch will not impact views.

Mr. DiLoretto testified that he is a neighbor to the south of the Applicant; that he supports the request and it will not take away from the neighborhood.

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

Mr. Williamson moved to approve Application No. 12379 as the lot is small and the exceptional practical difficulty was not created by the Applicant.

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

The vote by roll call; Mr. Chorman – yea, Mr. Workman – yea, Mr. Williamson – yea, Dr. Carson – yea and Ms. Magee – yea.

Case No. 12380 – Charles & Patricia Humphreys seek variances from the side yard setback requirements for existing structures (Sections 115-42 and 115-185 of the Sussex County Zoning Code). The property is located on the west side of W. Lagoon Dr. approximately 228 ft. south of N. Dogwood Rd. in the Dogwood Acres subdivision. 911 Address: 30881 W. Lagoon Rd., Dagsboro. Zoning District: GR. Tax Parcel: 134-6.00-81.00

Ms. Cornwell presented the case and stated that the Office of Planning and Zoning received one letter in support of or no correspondence in opposition to the Application and zero mail returns. The Applicant is requesting a variance of 5.6 ft. from the required 10 ft side yard setback on the north side for a temporary pool.

Ms. Taylor Trapp, Esquire, presented the Application on behalf of the Applicant.

Ms. Trapp stated that the request is for a temporary swimming pool which will be removed during the winter months; that the pool is a portable inflatable pool; that a pool which is greater than 18" deep needs to meet the setback requirements; that the pool will be located 4.4 feet from the side property line; that the property is unique as it is a shallow lot; that, due to the configuration of the lot and the placement of the septic system, the pool cannot be placed in any other location; that the Applicants did not create the exceptional practical difficulty as the largest portion of the yard has a drainage field and the pool cannot be placed in that location; that the drainage system was already in existence prior to the house being built; that there is a shed and retention pond in the rear; that the variance will not alter the character of the neighborhood as this pool is a temporary pool and only used during the summer months; that the pool has been there in the past; that there are similar temporary pools in the neighborhood; that it is the minimum variance to afford relief; and that a variance was granted for the shed in May 2015.

Charles and Patricia Humphreys were sworn in to give testimony about the Application.

Mr. Humphreys affirmed the statements made by Ms. Trapp as true and correct. Mr. Humphreys testified that he was concerned about a complete failure of the pool which holds 3,284 gallons of water and its impact on neighboring septics; that he contacted Scott West of Septic Systems who told him that it would not compromise the septic system; that he contacted Brian at DNREC and was told that this type of pool did not violate any codes; that he intends to place a privacy fence around the pool to comply with County Code; that the house was built in 2018; that the pool is 3.5' deep and is 15' wide; that the pool is easily removable; that the pool was moved when the new house was built; that the neighbor has a mound septic system; that there were no complaints about the prior pool; and that it takes a couple of days to fill up the pool.

Keith Springer was sworn in to give testimony in opposition to the Application.

Mr. Springer testified that he lives next door to the Applicants; that the Applicants had a pool in previous years; that the Applicants built a new home but neglected to plan for the pool; that the pool holds 3,200 gallons; that he shares a septic system with a neighbor and the system is a mound system; that the exceptional practical difficulty was created by the Applicant as he failed to plan for placement of the pool when building the new home; that he complained about the pool when it was first placed; that the pool drains into his drainfield and towards the road; that there is one other pool in the neighborhood; and that he would be fine with the pool on the other side of the house.

Mr. Humphreys testified that there is nowhere else to place the pool; that, only after construction was completed, did they learn about the septic location; that they wanted to put the pool in the front yard; that the water will not run into the neighboring property; that they had a smaller pool but could not use it; that there is a concrete pad off the garage; that the shed is also used as a garage; that the pool drains in the side yard when the plug is pulled; that the septic system was installed when the house was built; that they have owned the property since 1996 and later bought adjacent lots; and that a pipe drains from his gutter system to a swale.

Mrs. Humphreys testified that a County Inspector gave them incorrect information and that the inspector told them there were no permit or code requirements for a temporary pool.

Ms. Trapp stated that the Applicants are here due to a complaint being levied.

Linda Springer was sworn in to give testimony in opposition to the Application.

Mr. Springer submitted pictures to Board members to show the run off during storm conditions.

Ms. Springer testified that a significant amount of run off occurs during rainstorms and she is

concerned with the amount that would be dumped onto the ground when emptying the pool.

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

Mr. Chorman moved to approve Application No. 12380, as it will not alter the essential character of the neighborhood as it is temporary, and that the property does have unique physical condition. The motion failed for lack of a second.

Dr. Carson moved to deny Application No. 12380 as the Applicant has created the exceptional practical difficulty.

Dr. Carson moved, seconded by Mr. Williamson, and carried that the **variance be denied for the reasons stated.** Motion carried 4 - 1.

The vote by roll call; Mr. Chorman – nay, Mr. Workman – yea, Mr. Williamson – yea, Dr. Carson – yea and Ms. Magee – yea.

OLD BUSINESS

Case No. 12373 – Christian & Constance Brauer, and Andrew & Christine Malaney seek an appeal of a determination by the Planning Director (Sections 115-208 and 115-209 of the Sussex County Zoning Code). The property is a portion of the parcel located on the southeast corner of N. Old State Rd. and Fleatown Rd. 911 Address: 11671 Fleatown Rd., Lincoln. Zoning District: HI-1/GR. Tax Parcel: 230-19.00-111.00 (Portion)

Ms. Cornwell recused herself from discussion of this appeal.

Mr. Sharp reviewed the issues presented on the appeal before the Board and explained the Board's role in this matter.

After a brief discussion, Dr. Carson made the following motion:

I move that we affirm the decision of the Director as it pertains to **Case # 12373 – Christian & Constance Brauer and Andrew & Christine Malaney** pending a final written decision based upon the record made during the public hearing and for the following reasons:

1. This appeal pertains to property zoned HI-1 (Heavy Industrial) located near Ellendale, Delaware. Chaney Enterprises proposes to operate a concrete production facility on this site.

2. On appeal, neighbors raise 3 issues to the Board alleging that the Director erred in:

a) Not requiring the Applicant to apply to the Board for a potentially hazardous use.
b) Not requiring the Applicant to submit a special use exception application
c) Permitting the site plan approval process to proceed

3. With regard to the first issue, I find that the Director was correct in not requiring Chaney Enterprises to apply to the Board for a potentially hazardous use. §115-110(c) identifies "concrete products and mixing and proportioning plants" as permitted uses. A mixing and proportioning plant, which is also referred to as a central mixing plant, involves the mixture of ingredients to create concrete. Water is added during that process. This type of plant is sometimes referred to as a "wet" plant. The Applicant proposes to operate a concrete batching plant which is sometimes referred to as a "dry" plant. With a concrete batching plant, the mixture is created and water is added to concrete trucks in batches. While the two types of plants have different names, the distinction is one without a difference. The appellants' attorney acknowledged that "a concrete central mixing and proportioning plant has identical ingredients and methods of processing the raw materials into concrete as a concrete batching plant" and that "the terms of the two facilities are interchangeable." While the appellants' attorney later retracted the "interchangeable" statement, the materials subsequently provided by the appellants note that "regardless of the type of facility, the emission sources are generally consistent." The only significant difference between the two facilities is when water is added to the mix. Though a concrete batching plant is not identified as a specifically permitted use, Chaney's proposed use is clearly a "similar industrial use" with no greater objectionable influences than a central mixing plant. There was no doubt as to the proposed use, product, or process. As such, the proposed use is permitted and the Director was correct in not referring this application to the Board as a potentially hazardous use.

4. I also find that the application does not need to be submitted as a potentially hazardous use under §115-111. Appellants argued that §115-111 applies because the production of concrete involves the use of materials such as cement, sand, and gravel. The appellants suggest that the presence of these materials in the concrete-making process requires that the use be considered potentially hazardous. I disagree. Chaney is not making cement, sand, or gravel. Rather, these are ingredients in the production of concrete. Using this logic, no concrete facility would be allowed without a potentially hazardous use hearing and that argument flies in the fact of the plain reading of §115-110(c) which identifies concrete products, mixing and proportioning plants, and similar industrial uses as permitted uses. Likewise, such a broad reading also runs contrary to the plain reading of other portions of the Code. For example, flour is identified as a potentially hazardous use but a bakery is listed as a permitted use. I refuse to adopt the appellants' argument here.

5. With regard to the second issue, I find that the Director was correct in not requiring Chaney Enterprises to submit a special use exception. The appellants argued that a special use

exception is required under §115-210 but that argument is flawed. §115-210 is a general list of uses which require special use exception and those uses "are specified in each district." A concrete batching plant, however, is not specified as needing a special use exception in the HI-1 district.

6. While in other zoning districts, the Code requires applicants to obtain special use exceptions prior to operating concrete batching plants no such requirement in the HI-1 zoning district. When looking at the Code in its full context, the lack of this prior authorization makes sense. The HI-1 zone is the most intensive zoning classification and the purpose of the district is to preserve land for industrial uses and exclude new residential or commercial development. In other words, the additional layer of approvals required in other districts for this use is not required in the HI-1 district because the district was designed for these types of uses.

7. Acceptance of the appellants' arguments would create an absurd result whereby an owner of a property zoned heavy industrial would be required to obtain a special use exception and a potentially hazardous use approval prior to operating a concrete batch plant. This position runs contrary to the plain meaning of the statutory language in the Code and the literal interpretation thereof.

8. With regard to the third issue, since the proposed use is a permitted use under §115-110(c), the Director did not err in permitting the site plan approval process to proceed.

For these reasons, I move that we affirm the decision of the Director.

The motion was seconded by Mr. Williamson and carried that the Director's decision be affirmed and the appeal be denied. Motion carried 4-1.

The vote by roll call; Mr. Chorman – nay, Mr. Workman – yea, Mr. Williamson – yea, Dr. Carson – yea and Ms. Magee – yea.

ADDITIONAL BUSINESS

Mr. Chorman stated that he will not be present at the meeting dated November 18, 2019.

Meeting was adjourned at 8:14 p.m.