

**BOARD OF ADJUSTMENT MEETING  
CITY OF REHOBOTH BEACH**

**June 22, 2015**

The Board of Adjustment Meeting of the City of Rehoboth Beach was called to order at 7:00 p.m. by Chairman Thomas Evans on Monday, June 22, 2015 in the Commissioners Room in City Hall, 229 Rehoboth Avenue, Rehoboth Beach, DE.

**ROLL CALL**

Present: Mr. Clifton Hilderley  
Mr. Chuck Donohoe  
Mr. Thomas Evans  
Ms. Myrna Kelley  
Mr. Doug Popham

Also in attendance: Mr. Craig Karsnitz, Esq., Board of Adjustment Solicitor

A quorum was present.

**CORRESPONDENCE**

There was none.

**APPROVAL OF MINUTES**

Minutes of the March 23, 2015, April 27, 2015 and May 18, 2015 Board of Adjustment Meetings were distributed prior to the meeting.

Ms. Myrna Kelley made a motion, seconded by Mr. Doug Popham, to approve the Minutes of the March 23, 2015 Board of Adjustment Meeting as written. Motion carried unanimously.

Mr. Popham made a motion, seconded by Mr. Chuck Donohoe, to approve the Minutes of the April 27, 2015 Board of Adjustment Meeting as written. Motion carried unanimously.

Mr. Donohoe made a motion, seconded by Mr. Popham, to approve the Minutes of the May 18, 2015 Board of Adjustment Meeting as written. Motion carried unanimously.

**OLD BUSINESS**

There was none.

**NEW BUSINESS**

**Case No. 0315-04.** REQUEST FOR VARIANCE in regard to Section 270-28 of the Municipal Code of Rehoboth Beach to exceed the 5,000 square footage limitation on floor space devoted to restaurant purposes. The property is located in the C-1 Zoning District on Lot No. 112, Block Rehoboth, at 320 Rehoboth Avenue. The Variance is being requested by Mariah Calagione of Red Wagon LLC, owner of the property. Chairman Evans read the reasons for granting a Variance from Section 270-74(C) of the Zoning Code and noted the Public Hearing procedures.

Building Inspector Terri Sullivan read her report with exhibits. The Property Owner is requesting a rehearing of the request for a variance from Section 270-28 – limitation on the size of restaurants. The area in a given building devoted to restaurant purposes where alcoholic liquor is consumed on the premises shall not be larger than 5,000 square feet of floor space, including seated dining area, food storage and preparation area, passageways and entrance foyer, restrooms, dance floor and bar area, except that where a restaurant occupies space in a building also housing a hotel/motel containing at least 25 bedrooms, the area devoted to restaurant purposes may occupy up to but not more than 7,500 square feet. The owners are requesting permission to build a new restaurant of 9,820 square feet with 8,894 square feet devoted to restaurant purposes. While the Applicant excluded the Mechanical Room and the Office from the square footage devoted to restaurant purposes, the City believes these areas should be included. The City does concede that 82% of the distillery may be eliminated from the square footage devoted to restaurant purposes since only 18% of the product is consumed onsite. The City calculated the total square footage devoted to restaurant purposes as 9,349 if using the drawing which states that the total square footage of the building is 9,607. The owners are requesting a

variance so that they may tear down the existing Dogfish Head restaurant and build a new 9,820 or 9,607 square foot restaurant and eliminate the parking area. The original plan had called out 9,820 square which does not include the merchandise area or the outdoor dining. The letter received on June 8, 2015 calls out a request for 9,820 square feet for the new brew pub building, and 8,894 square feet would be devoted to restaurant purposes. The plan calls out 8,902 square feet devoted to restaurant purposes and the total gross square footage of the building at 9,607. Ms. Sullivan did the calculations based on the 9,820 square feet minus 258 square feet for 82% of the distillery. The total is 9,562 square feet. The drawing takes precedence, but it is not a stamped drawing.

City Solicitor Mandalas noted that the City takes no position on the argument being made by Dogfish Head that it meets the quick check standards. The City is taking the position that the Applicants do not meet the 5,000 square foot limitation.

Board Solicitor Craig Karsnitz noted that the Application this evening is for an area variance. The existing structure is a nonconforming area use, but the request is to expand that to a certain extent. Attorney Karsnitz referred to a Delaware Supreme Court case from May 1977 which set forth the exceptional practical difficulty standard for area variances. In that case, it talks about the practical difficulties test which is defined by the Court that the Board's duty is bound to address the difficulties presented by the owner and determine whether they are practical as distinguished from theoretical and exceptional rather than routine because these statutory standards apply a foundation for the Board's power. The Court determined in the quick check case that the Board contends that even under the exceptional practical difficulties of ownership test, the Superior Court erred in holding that economic considerations standing alone may be a sufficient justification for granting a variance. The inability to improve one's business or to stay competitive as a result of area limitations may be a legitimate exceptional practical difficulty that would justify a grant of variance. Such practical difficulty is present where the requested dimensional change is minimal, and the harm to the Applicant of the variance if denied will be greater than the probable effect on neighboring properties if the variance is granted. The difficulties presented by the owner are practical rather than theoretical and exceptional rather than routine, the Board should take into consideration the nature of the zone in which the property lies, the character of the immediate vicinity and the uses contained therein, whether if a restriction upon the Applicant's property were removed, such removal would seriously affect neighboring property and uses and whether if the restriction is not removed, the restriction would create unnecessary hardship or exceptional practical difficulty for the owner in relation to his efforts to make normal improvements in the character of that use of the property which is permitted under the use provisions of the ordinance. The case says that economic loss alone can be held to be an exceptional practical difficulty if those standards are met. What has to be determined in this case this evening is whether or not there are minimal changes to the area of use. The Board is not particularly adept, nor should it be to do much of an economic analysis of a business. The Board is not here to decide whether Dogfish Head are good people and is a good business. The issue is whether what has been proposed meets the standard that the law sets forth for exceptional practical difficulties. Attorney Karsnitz's view is that there is very little precedential effect of previous decisions of this Board. Each case stands on its own facts and rests on its own legal principles.

Mr. Mark Dunkle, Esq. of Parkowski, Guerke & Swayze P.A. provided testimony on behalf of the Applicants. The nature of the zone in which the property lies is C-1 - Central Commercial, and this restaurant fits in this zoning district. This zone allows restaurants that serve alcohol, and zoning permits the brew pub use. Rehoboth Avenue is the main thoroughfare for the City, and the new Dogfish Brew Pub fits into the current trend of new commercial construction/expansion on this street, offering a variety in architectural styles and commercial uses, including the restaurant use focus supporting the Restaurant Capital of Delaware designation. The CDP strongly encourages the mixing of commercial and residential uses to maintain a strong downtown, and this new construction improves the compatibility of Dogfish Brew Pub with the Scarborough residential condominium. Granting the variance will benefit, not harm, the existing residential neighbors by reducing noise, crowds and refuse smells, and improving the aesthetics of the site with new green and code compliant construction. The commercial neighbors benefit from the Dogfish financial investment in new construction, adding value to the City's main commercial corridor. Given the existing Brew Pub size of 8,280 square feet, the increased size of the new building to 9,820 square feet, with no net seating increase. It is a minimal dimensional change that due to the new construction and superior design reduces rather than increases any adverse impact on the neighbors. Without the variance permitting the replacement of the obsolete 8,280 square footage with the new code compliant 9,820 square foot brew pub, the Applicant faces an exceptional practical difficulty in remaining competitive with the newer, modernized and larger restaurants previously approved by the Board, and it prevents the Applicant from making the normal long term capital investment in new construction on Rehoboth Avenue that allows continued innovation in the unique brew pub restaurant business, including the brewing and distilling operations which add to the unique size requirements of this restaurant.

The Supreme Court Kwik Check four factors all support the granting of the Dogfish Brew Pub variance; the court's overall directive to the Board is for it to consider the four factors, weighing the potential harm to the neighboring properties and by granting the variance to the Applicant. The benefits to allowing this new construction far outweigh any harm, and the harm to Dogfish's ability to remain a nationally recognized leader in the brew pub field and downtown Rehoboth Beach destination in the Restaurant Capital of Delaware is far more at risk if the variance is denied. Attorney Dunkle said that 82% of the distillery is deducted from the 5,000 square foot restaurant limitation. The mechanical room and office would be removed from the calculation. There would be a 600 square foot increase in nonconformity.

Mr. Sam Calagione, President and Founder of Dogfish Head, provided a brief history of the restaurant. The reason to do this rebuild is to provide a wonderful place to work and to provide an upscale, clean and safe business.

Mr. Nicholas Benz, CEO of Dogfish Head, provided testimony in support of the variance. The building is beyond the state of a simple repair. It is necessary to remain competitive. He met with the Board of Scarborough Village. With regard to noise, the building will act as a buffer. The trash bins will be located along the side of the building away from the residences. With regard to grading of the property, the Applicant will need to meet the requirements of Sussex Conservation District. New kitchen exhaust fans will be provided to remove odors. Fewer seats will be provided in the new building.

Ms. Mariah Calagione of Dogfish Head provided testimony in support of the variance and noted that this facility has 107 coworkers with 46 of them being full-time and 27 of them being part-time year-round.

Mr. Bob McGleesh of Lighthouse Engineering provided testimony in support of the variance and noted that the building will be designed to the 2012 International Code.

Chairman Evans recessed the meeting at 8:25 p.m. The meeting reconvened at 8:42 p.m.

After a brief discussion with the Building Inspection, Attorney Dunkle agreed that the gross total building size is 9,709 square feet with an 82% reduction for the distillery that should be made which reduces the number of square feet to 9,451. The variance request is for 9,451 square feet which is the area devoted to restaurant purposes. At 9,451 square feet, there is 1,171 square feet more than the current building. The City conceded the dumpster area at 111 square feet.

Correspondence:

1. Letter received April 22, 2015 from Mr. John Erdner, President of Scarborough Village Association of Owners, was concerned that (1) the poor storm management for runoff water from Dogfish Head will get worse; (2) the foul odor from the trash bins will get worse and (3) the noise coming from Dogfish Head late in the evening will get worse if the restaurant is granted the variance.
2. Letter received May 8, 2015 from Mr. Ralph Bassett, 5 Cookman Street – in support of.
3. Email received May 11, 2015 from Mr. Ron Ozer, address unknown – in support of.
4. Letter received May 15, 2015 from Ms. Catherine R. Lewis, Lewes DE – in opposition to.
5. Letter received May 18, 2015 from Ms. Krys Johnson, Executive Director of Rehoboth Beach Main Street – in support of.
6. Email received May 18, 2015 from Mr. Barry Rosenthal, address unknown – in support of.
7. Letter received May 18, 2015 from Ms. Carol Everhart, President/CEO of Rehoboth Beach/Dewey Beach Chamber of Commerce – in support of.
8. Email received May 18, 2015 from Ms. Marcia Schieck, Scarborough Avenue Extended – in support of.
9. Email received May 18, 2015 from Ms. Kathy Osterholm, 109 Hickman Street – in support of.
10. Letter received May 19, 2015 from Ms. Deborah Macon, 12 Park Avenue – in support of.
11. Letter received June 1, 2015 from Ms. Carol Everhart, President/CEO of Rehoboth Beach/Dewey Beach Chamber of Commerce – in support of.
12. Email received June 22, 2015 from Ms. Linda Kauffman, 206 Laurel Street – in support of.
13. Letter received June 22, 2015 from Ms. Marcia DeWitt, 55 Field End, Henlopen Acres – in support of.
14. Letter received June 22, 2015 from Mr. John Erdner, President of Scarborough Village Association of Owners – no position. The Association is requesting that if any variance is granted and any final design is permitted, its concerns should be addressed.

Public Comment:

1. Ms. Heidi Lowe, Rehoboth Avenue – in support of.

2. Ms. Maria Evans, Lewes - in support of.
3. Mr. Mark Robowski, 220 Rehoboth Avenue – in support of.
4. Ms. Carol Everhart, Chamber of Commerce – in support of.
5. Ms. Linda Kauffman , 206 Laurel Street – in support of.
6. Mr. Paul Kuhns, Stockley Street – in support of.
7. Ms. Donna Stone, address unknown – in support of.
8. Mr. Gene Lawson, 12 Hickman Street – in support of.
9. Mr. Troy (last name unknown), Scarborough Village Association – no position.
10. Mr. Russell Keys, Scarborough Village – in opposition to.

Ms. Kelley made a motion, seconded by Mr. Popham, to grant the request for variance of 9,451 square feet with no increase in seating capacity.

Mr. Donohoe said that he is in favor of modernizing the facility. The Board of Adjustment members are constrained by the laws, not by popularity of Dogfish Head. In 1991, law was enacted limiting the size of restaurants serving liquor to 5,000 square feet. The starting point is not 8,280 square feet, it is 5,000 square feet so the variance is from 5,000 square feet. This would be an approximate 85% increase in the size of the restaurant. With regard to the Kwik check considerations, he agreed that the zoning permits a brew-pub use. The nature of the zone is for restaurants serving alcohol to be 5,000 square feet. The character of the neighborhood is mixed use. Mr. Donohoe did not believe that if the restriction is removed, it would not affect the neighborhood. With regard to the restriction that it would create an exceptional, practical difficulty for the owner in relation to his efforts to make normal improvements, there is no evidence to explain why the modernizations and improvements cannot be made with either a 5,000 square foot facility size or a more minimal variance request of the current size at 8,280 square feet. Dogfish Head should go to the Board Commissioners and ask it for a change in the Code, and not come before the Board of Adjustment to adjust the Code dependent upon the needs of the Applicant.

Mr. Hilderley said that the property is legal nonconforming. The Board of Adjustment cannot give a variance to expand a nonconformity and make it more nonconforming. The four factors from the Kwik Check case have been met. The Board has heard a lot of evidence about the problems with renovating a nonconforming piece of property. The Board has to give consideration to the back of the house requirements for keeping up-to-date with the economics, and the social aspects should be taken into consideration.

Ms. Kelley noted that the Board is charged to make judgments on things that may not be in the Code. The Kwik Check points has been met.

(Hilderley – for. The issues are both mechanical and fall into the category of why the Board is here and the authority it has to grant a variance. The evidence it has received and the testimony it has received supports the Board granting the variance. Donohoe – against, for the reasons previously stated. Evans – for. There is a lot that could be said, but the bottom line is that exception practical difficulties have been demonstrated by Dogfish Head and its representatives. Kelley – for, as she previously stated as reasons, and for the fact that exceptional practical difficulty standards have been met in her opinion. Popham – for. He agreed with a lot of what Mr. Donohoe has said and also what Mr. Hilderley has said, but in light of what courts have ruled, he thought it was a foregone conclusion that the Board grants the variance.) Motion carried.

## **OTHER BUSINESS**

There was none.

There being no further business, Chairman Evans adjourned the meeting at 9:28 p.m.

**Respectfully submitted,**

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**(Ann M. Womack, City Secretary)**

**MINUTES APPROVED ON  
OCTOBER 26, 2015**

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**(Thomas Evans, Chairman)**