

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

September 26, 2011

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, September 26, 2011 in the Commissioners Room in City Hall, 229 Rehoboth Avenue, Rehoboth Beach, DE.

ROLL CALL

Present: Mr. Doug Popham
Mr. Thomas Evans
Mr. Frank Cooper

Absent: Ms. Myrna Kelley
Mr. Clifton Hilderley

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

A quorum was present.

CORRESPONDENCE

There was none.

APPROVAL OF MINUTES

Minutes of the June 27, 2011 Board of Adjustment meeting were distributed prior to the meeting.

Mr. Frank Cooper made a motion, seconded by Mr. Doug Popham, to approve the minutes of the June 27, 2011 meeting as written. Motion carried unanimously.

OLD BUSINESS

There was none.

NEW BUSINESS

Case No. 0811-04. A REQUEST FOR VARIANCES in regard to Section 270-26 of the Municipal Code of Rehoboth Beach requiring a minimum of 6 feet of side yard with an aggregate total of 16 feet, Section 270-21(A)(1) requiring 40% of the gross lot area to remain a natural area, and Section 270-44(B) requiring accessory buildings to have two side yards of at least four feet in width and one rear yard four feet in depth. The property is located in the R-1 Zoning District on Lots 40 & 41, Block 17 at 607 Bayard Avenue. The Variances are being requested by William Schab, Esq. of the law firm Schab & Barnett, P.A. on behalf of John & Elizabeth Rhoads of R. Beach Villa LLC, owners 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 gave her report with exhibits. (Copy attached.) At this time, there is no proposed project that Building & Licensing is aware of. The owners are looking to receive a Variance for the zoning violations so that they may have a clear title to their property.

Mr. William Schab, Esq. of the law firm Schab & Barnett, P.A., who represented Mr. John and Mrs. Elizabeth Rhoads of R. Beach Villa LLC, provided testimony in regard to the Variance requests. The Variances being requested are: (1) The dwelling at one end is 5.5 feet from the common property line therefore a Variance of 0.5 feet (six inches) is being requested. (2) The structure which is a dollhouse at one end is 3.4 feet from the common property line therefore a Variance of 0.8 feet (10 inches) is being requested. (3) Because of the existing improvements on the lot, the natural area is 35% (1,771 square feet) therefore a Variance of 5% (229 square feet) is being requested. The boardwalk covers 171 square feet of the lot; and even if the boardwalk would be removed, a Variance would still be needed. (4) One of the two HVAC units on the lot nearest to Lot 39 is 2.7 feet from the property line therefore a variance of 3.3 feet is being requested. Neither the spirit nor the intent of the ordinances will be violated or compromised if the Variances being sought are granted. Photographs were provided from different angles which show the areas in question. Mr. John Rhoads also provided testimony in regard to the Variance requests.

Correspondence:

1. Letter dated August 12, 2011 and received September 22, 2011 from Paul A. and Barbara K. Flexer, 607 Bayard Avenue – in support of.
2. Petition in support of the variances was received September 22, 2011 and signed:
 - A. August 9, 2011 by Paul Kuhns, 125 Stockley Street.
 - B. August 9, 2011 by Anne Michele Kuhns, 125 Stockley Street.
 - C. August 12, 2011 by Vince Robertson, 703 Bayard Avenue.
 - D. August 12, 2011 by Carrie Robertson, 703 Bayard Avenue.
 - E. September 4, 2011 by Rose Schreiber, 701 Bayard Avenue.
 - F. September 4, 2011, illegible signature, 701 Bayard Avenue.
 - G. September 4, 2011 by Steven Kaufman, 200 & 202 Stockley Street.
 - H. September 4, 2011 by Sharon Kaufman, 200 Stockley Street.
 - I. September 4, 2011 by Ian Cohen, 201 Stockley Street.
 - J. September 4, 2011 by Judy Cohen, 201 Stockley Street.

There was no public comment.

Mr. Cooper made a motion, seconded by Mr. Popham, to grant the four Variances.

Mr. Cooper had some question about the boardwalk; and although the case was presented that it does not bring this property into compliance as far as coverage, it does not put a serious dent in it. It does not seem to be that great a hardship in the removal of the boardwalk. The Applicants would not have to move anything else. There are no other existing items that need to be moved in order to remove the boardwalk. He questioned the validity of the boardwalk, whereas sod or mulch might do the same thing. The other three items seem to have been there for quite awhile.

(Popham – for, Evans – against, Cooper – against.) Motion failed.

Mr. Cooper made a motion, seconded by Mr. Popham, to grant the Variances for the house being too close to Lot 39, for the dollhouse being too close to Lot 42 and for the HVAC unit being too close to Lot 39.

Board Solicitor Craig Karsnitz suggested that if Mr. Cooper wanted to do this all in one motion, he could say that with the natural area, the Board would grant the Variance but not to include the boardwalk.

Mr. Cooper refashioned his motion, seconded by Mr. Popham, to grant all of the Variances with the exception of the 5% natural coverage area by excluding the boardwalk.

Board Solicitor Karsnitz said with respect to that, the Board wants to grant that Variance, but to exclude the boardwalk. The boardwalk would have to be eliminated; and the overage with that eliminated would be approved.

Mr. Evans said that as long as the motion is clear, he understands the intent of the motion. The three of them are absolutely clear: (1) the HVAC unit. (2) the dollhouse which is impractical to move. (3) the house which is nearly impossible to move. With the boardwalk being removed, the overage on coverage is also approved.

(Popham – for, Evans – for, Cooper – for.) Motion carried unanimously. All Variances were granted with the exception that the boardwalk must be removed and the Applicants are in compliance with green space.

Case No. 0811-05. A REQUEST FOR A VARIANCE in regard to Sections 270-22(A)(2), 270-22(B) and 270-23 of the Municipal Code of Rehoboth Beach requiring a minimum lot area of 5,000 square feet. The property is located in the R-1 Zoning District on Lots 99 & 101 at 125 Columbia Avenue. The Variance is being requested by Daniel P. Myers II, Esq. of the law firm Hudson, Jones, Jaywork & Fisher LLC on behalf of Frederick Hess III, Nancy J. Hess and Susan R. Maliot, owners 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 gave her report with exhibits. (Copy attached.) The owners are proposing to partition the lots so that they can be sold. Ms. Sullivan has not been informed of any proposed construction for the property at this time. Ms. Sullivan did not know if the lots were initially plotted in the Rehoboth Beach Camp Meeting Association of the Methodist Episcopal Church layout of the City. Ms. Sullivan acknowledged she has no evidence that any owner of the properties did anything to merge the two lots other than the County Tax Map as well as the City both say that the lot is 100 feet x 100 feet.

City Solicitor Glenn Mandalas was in attendance at the meeting and provided additional testimony. The only evidence the City has suggests that the two lots are merged because the County Tax Map and the City Tax Map say they are merged. In the absence of any other evidence, the only discretion the building official has in this instance is none. Ms. Sullivan has to rely on only the evidence she is given; and the only evidence she has at this time is that the two lots are merged.

Board Solicitor Craig Karsnitz said that what the County and the City do is of no effect in the rights of the owner. The owners, themselves, are the only ones that can create a merger, and it cannot be created by just records in the City and the County. Where the building official is relying upon what the City or County did is no evidence. It does not prove anything with respect to whether the lots have merged.

Mr. Daniel P. Myers II, Esq. of the law firm Hudson, Jones, Jaywork & Fisher LLC, who represented Mr. Frederick Hess III, Nancy J. Hess and Susan R. Maliot, provided testimony in regard to the Variance request. The owners request the Board of Adjustment to grant a 0.62 square foot Variance from the 5,000 square foot lot requirement for each lot. While Lots 99 and 101 are each 50 feet wide and 100 feet in length, they are not perfect rectangles because each one is missing a small triangular sliver of land. Because each triangle is 0.62 square feet in area, and because the height of each triangle is 100 feet, the base of each missing sliver of land is 0.2976 of an inch or less than 5/16 of an inch. The intent and purpose of the Zoning code, in this case the minimum lot size of 5,000 square feet, will in no way be impaired. The reduction 0.62 square feet is so small that it amounts to a triangular parcel of land with a base of less than 5/32 of an inch wide and cannot be detected by the naked eye. Ms. Susan R. Maliot also provided testimony in support of the Variance request.

Mr. Doug Wingate, PLS of Wingate & Eschenbach provided additional testimony in support of the Variance request.

Correspondence:

1. Email received September 26, 2011 from Larry Myslewski, 2 Dover Street – in opposition to allowing a lot size of less than 5,000 square feet.
2. Email received September 26, 2011 from Clayton Fisher, 124 Columbia Avenue – in opposition to the request to reduce the allowable lot size to less than 5,000 square feet.
3. Email received September 26, 2011 from Patty Fisher, 124 Columbia Avenue – in opposition to the Variance request.

There was no public comment.

Chairman Evans said that there are two Variance requests before the Board of Adjustment according to the way it is worded in the Application. One is to grant a Variance for the lots being less than 5,000 square feet, not recognizing them as 5,000 square feet. It would be recognized as buildable lots of less than 5,000 square feet. Attorney Myers said that the second Variance request is for the lots to be treated as 5,000 square feet whereas appealing the decision of the Building Inspector.

Board Solicitor Karsnitz noted that either the Applicant is appealing the decision of the Building Inspector that these are sub-standard lots and are not stand alone lots, or a Variance is being requested.

Attorney Myers said that the Applicants are appealing the decision of the Building Inspector that these are not recognizable lots because they are less than 5,000 square feet. Board Attorney Karsnitz said that if this is correct, these lots would not need to be partitioned. They are already recognizable lots.

City Solicitor Mandalas added that these lots would not be treated as 5,000 square foot lots. For coverage, Floor Area Ratio (FAR), etc., the lots are 4,999.38 square feet. Chairman Evans said that these are sub-sized lots which have been allowed to be treated as buildable lots.

Attorney Myers said that the Applicants are appealing the decision of the Building Inspector that these lots need to be partitioned because they are separate lots.

City Solicitor Mandalas did not think that this case was properly noticed in regard to appealing the decision of the Building Inspector. The Planning Commission would want to be in attendance at this meeting to weigh in on this matter. Board Solicitor Karsnitz noted that the Board of Adjustment would not under any circumstances be granting a partitioning, but it can certainly review the decision of the Building Inspector as to whether these are properly allocated lots under the City ordinances and the City Code. With regard to whether an appeal issue was properly noticed, the public notice only indicates a request for a Variance. In the past, the Board of Adjustment has allowed an applicant to be heard regarding an appeal

when only a variance request was noticed. Under the theory that when there is notice of what the applicant is intending to do, the legal issue of whether it is a variance or an appeal is not significant enough to require separate notice. This would be the decision of the Board. City Solicitor Mandalas said generally he agrees that the Board could do either an appeal or variance in most instances where the Board is dealing with a setback, etc. where the Building Inspector is typically the final arbiter. In this case where there is a separate body which deals with numbers of lots, sizes of lots, partitioning of lots and this is implicated here, that body should have been put on notice that the Board will be dealing with this issue and have an option to weigh in.

Board Solicitor Karsnitz said that the Board can grant a Variance to allow a sub-standard lot. The Applicants would have a Variance from the normal 5,000 square foot requirement. If the City still takes the position that the lot needs partitioning, then the Applicants will need to deal with the partition issue. The Board has no jurisdiction over any of that.

Mr. Cooper made a motion, seconded by Mr. Popham, to grant an Appeal of the Decision of the Building Inspector that this is not a single lot that needs partitioning.

Board Solicitor Karsnitz noted that Mr. Cooper said nothing about the Variance in his motion. He is basically stating that the Building Inspector was wrong in determining that these are not two separate lots. Chairman Evans added that separate from this, these would be sub-standard sized lots.

Mr. Cooper added to his motion that there is a variance in the size of the lots, but they are still buildable lots.

Board Solicitor Karsnitz noted that Mr. Cooper also was saying that the Board should grant a Variance to allow these to be sub-standard lots. Mr. Cooper agreed. The Board should deal with the two motions, one at a time.

Mr. Cooper restated his motion, seconded by Mr. Popham, to grant the Appeal of the Decision of the Building Inspector that this is in fact is one lot in need of division. (Cooper – for, Evans – for, Popham – for.) Motion carried unanimously. The Board disagreed with the Building Inspector's decision that these lots require a partitioning. It was an error.

Mr. Cooper made a motion, seconded by Mr. Popham, to grant the Variance to create lots at 4,999.38 square feet. (Popham – for, Evans – for, Cooper – for.) Motion carried unanimously to make them buildable lots at 4999.38 square feet.

OTHER BUSINESS

Consideration of date for Board of Adjustment Meeting to be held in December 2011.

The date for the December meeting will be determined by Chairman Evans after polling the members.

There being no further business, Chairman Evans declared the meeting adjourned at 8:20 p.m.

Respectfully submitted,

(Ann M. Womack, City Secretary)

**MINUTES APPROVED ON
OCTOBER 24, 2011**

(Thomas A. Evans, Chairman)