

Date of Decision: March 2, 2021

Date of Filing of Decision: 3/22/21

**BEFORE THE BOARD OF ADJUSTMENT  
OF THE CITY OF LEWES**

**IN RE: 119-125 SCHLEY AVE.,  
APPLICATION OF  
CHRISTINE D. KING**

**DECISION OF THE BOARD**

The City of Lewes Board of Adjustment (the "Board") convened on Tuesday, March 2, 2021, via videoconference, to consider the variance request of Christine D. King (the "Applicant"), owner of 119-125 Schley Ave., Lewes, Delaware (SCTP 335-8.08-133.00) (the "Property"). The Applicant plans to subdivide the Property into four lots, with Lot 16 requiring area variances to permit the following: (1) 45.73 feet of street frontage; (2) a lot width of 45.73 feet; and (3) a total lot area of 4,552 square feet. Participating for the Board were Chairperson Brook Hedge and members Candace Vessella, Denise Emery and William Sharkey.<sup>1</sup> Also participating were Barrett Edwards, Esq., Board Attorney, Robin Davis, Building Official, Janelle Cornwell, Planning and Development Officer, and City Solicitor Glenn Mandalas, Esq. The Applicant participated in the hearing with her attorney William Schab, Esq., along with other members of the public.

**BACKGROUND**

The Property is situated in the Residential Medium-Density R-4 zoning district, as described in Chapter 197 of the Municipal Code of the City of Lewes (the "Zoning Code") and on the City's Official Zoning Map. As detailed in the Table of Dimensional Regulations in the Zoning Code, the minimum lot width and street frontage in the R-4 district is 50 feet, with the minimum lot area being 5,000 square feet.<sup>2</sup> The Applicant plans to subdivide the Property into four lots. For the lot known as Lot 16, the Applicant is seeking a 4.27-foot variance from the minimum lot width and street frontage requirements to create a lot having a width and street frontage of 45.73 feet. A variance of 448 square feet is also being sought for Lot 16 to have a total lot area of 4,552 square feet. The variance hearing before the Board was duly noticed in accordance with the Zoning Code.<sup>3</sup>

**EVIDENCE PRESENTED**

After Building Official Robin Davis summarized the application, William Schab, Esq., provided a history of the Property.<sup>4</sup> The Applicants purchased the Property in 1998, at which time it was 26,074 square feet in size. The Property was historically an industrial property, but about

<sup>1</sup> Board Member Richard Grier-Reynolds recused himself.

<sup>2</sup> The Zoning Code outlines different R-4 standards for the Burton Subdivision that do not apply here.

<sup>3</sup> Notices for the March 2, 2021 hearing were as follows: posting at the property: February 10, 2021; publication in the Cape Gazette: February 12, 2021; and posting at City Hall: February 9, 2021. It was clarified that the hearing notice included an error. The Property is actually zoned R-4 and not R-4(H).

<sup>4</sup> Mr. Schab and all other witnesses testifying at the hearing were duly sworn.

ten years ago the City adopted an ordinance allowing construction of duplexes on lots of at least 6,000 square feet. In light of and in reliance on this ordinance, the Applicant planned to subdivide the original 26,074 square foot lot into four equal lots. Each lot would have at least 6,000 square feet and would be used for a duplex. The Applicant subdivided and sold the first lot of 6,522 square feet for construction of a duplex. The Applicant planned to subdivide the remaining 19,552 square feet into three lots of at least 6,000 square feet for the construction of duplexes on each lot.

In 2019, the City discovered it had been misinterpreting the Zoning Code. The Code required a minimum 2.5-acre tract for duplex construction, which precluded the Applicant from constructing duplexes on the Property. The Property would need to be used for single-family dwellings. However, due to the Applicant's prior one lot subdivision approved by the City, the Applicant realized the Property was 448 square feet shy of the 20,000 square feet required to create four single-family lots. Had the Applicant foreseen this issue, the first lot subdivided for the duplex could have had the minimum 6,000 square feet, leaving exactly 20,000 square feet to create four single-family lots.

Mr. Schab provided pictures of over 200 properties in Lewes with less than 5,000 square feet. Given the number of lots in Lewes smaller than or similar in size to Lot 16, Mr. Schab testified that the variances should not detrimentally affect neighboring properties or property values. Mr. Schab presented a petition of 72 individual property owners who did not object to the variances, including a letter of support from the owner of the lot situated closest to the Property.

Ms. Christine King testified that the original property of 26,000 square feet had been surveyed to be subdivided into four lots for duplexes. However, the City eventually interpreted the Zoning Code in a way that prohibited duplexes on the Property. She pointed out that three [TWO ?] duplexes have been built on Schley Ave., and granting the variances to allow four single-family lots on Schley Ave. would enhance the area.

Former Mayor James Ford confirmed that the Applicant was in her current situation as result of the City misinterpreting the Zoning Code. Had the Zoning Code been properly interpreted, the Applicant would not need variances to create Lot 16. Mr. Ford acknowledged that while serving as Mayor, he had communicated with the Applicant regarding the Property being rezoned to residential and the possibility of subdividing the Property into lots for duplexes.

Dennis Forney testified that smaller lots support the core values of the City of Lewes for face-to-face interaction, and granting these variances would support the City's core values.

Lee Ann Wilkinson testified that she had been a realtor in the area for 38 years and had sold approximately 400 homes in the greater Lewes area over the past year. Dwellings on property under 5,000 square feet regularly sell for high prices in Lewes. She sold a house on a lot 3,480 square feet in size for around \$750,000. When asked, she agreed that lot size would likely have less of an impact on property values than being situated in an industrial area next to a water tower. After providing examples of houses on lots under 5,000 square feet that sold for amounts between \$500,000 and \$870,000, she testified that a slightly undersized lot would not hurt property values, and a greater number of residential properties in an industrial area would enhance property values.

Testifying in opposition to the application was Kevin McDonald, a Schley Avenue property owner. He testified that four single-family lots would sell for less money per lot than the three single-family lots currently permitted. He commented that the water tower had a loud water pump that would make the adjacent lot difficult to sell. A written statement by Kevin McDonald and his partner, Sean McClafferty, was entered into the record indicating that the variance request was “not in keeping with the existing lots and will [sic] detrimental to the residents of our street.” A letter of opposition signed by 9 residents was also entered into the record, alleging that granting the variances “would cause substantial detriment to the neighboring properties, owing to degraded streetscape and concomitant reductions in market values.”

Mr. Schab concluded the hearing by commenting that the Property was unique and unlike any other parcel in Lewes. The variances were needed to correct a mistake made by the City and, therefore, were the just and fair result. There would be no detriment to the City or public good by having one slightly smaller lot on Schley Ave., much less substantial detriment to anyone. The Comprehensive Plan would not be impaired since hundreds of lots in Lewes are less than 5,000 square feet. The evidence showed that granting the variances would not create any financial detriment to anyone.

### LEGAL STANDARDS

Section 197-19(C)(3) of the Zoning Code provides that the Board may “authorize variance[s] from the strict application of the provisions of [the Zoning Code] as authorized in 22 *Del. C.* § 327(a)(3) and in accordance with § 197-92 of [the Zoning Code].” Section 327(a)(3) of Title 22 of the Delaware Code provides that the Board may:

Authorize, in specific cases, such variance from any zoning ordinance, code or regulation that will not be contrary to the public interest, where, owing to special conditions or exceptional situations, a literal interpretation of any zoning ordinances, code or regulation will result in unnecessary hardship or exceptional practical difficulties to the owner of property so that the spirit of the ordinance, code or regulation shall be observed and substantial justice done, provided such relief may be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of any zoning ordinance, code, regulation or map . . . .

In order to grant area variances,<sup>5</sup> the Board must find that exceptional practical difficulties exist.<sup>6</sup> An exceptional practical difficulty exists “where the requested dimensional change is minimal and the harm to the applicant if the variance is denied will be greater than the probable effect on the neighboring properties if the variance is granted.”<sup>7</sup> The City Code identifies the following factors to weigh when making an exceptional practical difficulty determination: “(1)

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<sup>5</sup> Area variances address parcel characteristics such as “height, size or extent of lot coverage, size of the buildings, placement of the building on the site or other restrictions relating to the physical characteristics of the site.” *Wawa, Inc. v. New Castle County Bd. of Adjustment*, 929 A.2d 822, 830-31 (Del. Super. Ct. 2005). There is no dispute in the record that area variances (and not use variances) are being requested.

<sup>6</sup> *Bd. of Adjustment v. Kwik-Check Realty, Inc.*, Del. Supr. 389 A.2d 1289, 1291 (1978).

<sup>7</sup> *Wawa*, 929 A.2d at 831.

Nature of the zone where the property lies[;] (2) Character of the immediate vicinity[;] (3) Whether the restrictions, if lifted, would affect neighboring properties and uses[; and] (4) Whether the restriction would tend to create a hardship on the owner in relation to normal improvements.”<sup>8</sup>

Additionally, the Board must consider the following: “(1) The variance relates to a specific parcel of land, and the hardship is not shared generally by other properties in the same zoning district and vicinity[;] (2) The variance can be granted without substantial detriment to the public good[;] (3) The benefits from granting the variance would substantially outweigh any detriment[; and] (4) Approval of the variance would not substantially impair the intent and purposes of the Comprehensive Plan or [the Zoning Code].”<sup>9</sup>

## CONCLUSIONS

By a vote of four yea and zero nay (one recusal), the Board concludes that the Applicant has met the standards necessary to demonstrate an exceptional practical difficulty sufficient to warrant granting her request for variances for Lot 16.

The Applicant’s request for variances stems from a series of unfortunate events. Due to the City’s misinterpretation of the Zoning Code and representations made the mayor at that time, the Applicant subdivided one lot from the Property in a manner that would have presumably allowed the remaining property to be subsequently subdivided into three duplex lots. Once the City corrected course to only allow single-family dwellings, the Property lacked the square footage needed to create four single-family lots. If the Applicant could have predicted the City’s actions, the Applicant could have subdivided the first lot to leave sufficient land to create four conforming single-family lots. The Board concludes that as a result of these unpredictable circumstances and actions, the Property has unique physical characteristics not shared by other properties in the zoning district or vicinity.

The Board concludes from the evidence presented that the nature of the zone in which the property lies is historically industrial, parts of which are undergoing a residential transition. The character of the immediate vicinity includes, *inter alia*, a City water tower on an adjacent industrial parcel and three duplex lots. Given the character of the area, the Board finds that granting the variances to create one undersized lot would have minimal effect on neighboring properties and uses and no substantial detriment to the public good.

The Board finds that the benefits to the Applicant from receiving the variances will substantially outweigh any minor detriment to the neighboring properties, and denying the variances would create a hardship on the Applicant in relation to property improvements that would typically be allowed. Furthermore, the variances will not substantially impair the intent or purpose of the Comprehensive Plan or the Zoning Code. Although the variances are greater than what the Board typically considers, the variances are the minimum required for Lot 16.

In sum, the Board concludes that there are special conditions or exceptional situations associated with the Property resulting in exceptional practical difficulties, and the harm to the

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<sup>8</sup> City of Lewes Code, §§ 197-92(C)(1) – (4); *City of Lewes v. Nepa*, Del. Supr. 212 A.3d 270, 277 (2019).

<sup>9</sup> City of Lewes Code, §§ 197-92(B)(1) – (4).

Applicant from denying the variance would outweigh any effects on the neighboring properties as a result of the variance being granted. The Board concludes that the Applicants have satisfied the elements required under the exceptional practical difficulty standard and the requirements set forth in the Zoning Code for granting the variances.

**DECISION**

Based upon the foregoing and the evidence presented to the Board, it is the decision of the Board of Adjustment of the City of Lewes, by a vote of four yea and zero nay (one recusal), to **GRANT** the Applicant's request for three variances, as identified in the Applicant's submission and accompanying exhibits and testimony, with one lot, number 16, consisting of 4,552 square feet and having a lot width and street frontage of 45.73 feet.

**BOARD OF ADJUSTMENT  
OF THE CITY OF LEWES**

BY: Brook Hedge 3/10/21  
Brook Hedge, Chairperson

BY: Candace Vessella  
Candace Vessella, Vice Chairperson

BY: Denise Emery  
Denise Emery, Secretary

BY: William Sharkey  
William Sharkey, Member

BY: RECUSED  
Richard Grier-Reynolds Member

Dated: 3/12/21