

**BEFORE THE BOARD OF ADJUSTMENT  
OF THE TOWN OF FENWICK ISLAND, DELAWARE**

**IN RE:** :  
 :  
**APPLICATION OF** : **DECISION**  
 :  
**ROBIN GREEN** :

The Board of Adjustment of the Town of Fenwick Island, Delaware, convened at 10:00AM on Wednesday, November 13, 2019, and again at 10:00AM on Thursday, December 5, 2019, at the Town Hall, 800 Coastal Highway, Fenwick Island, Sussex County, Delaware, to hear the application of Robin Green ("Applicant") for a variance from the 20 foot rear yard setback requirement (see Section 160-8.C.(4)(a) of the Zoning Code of the Town of Fenwick Island) for her property located at 1706 Bunting Avenue, Fenwick Island, Delaware, Sussex County Tax Map and Parcel No. 1-34 23.08 24.00. Present for the Board of Adjustment were Chairman, Tim Collins, and members, Linda Bunting, Craig Lambertson, Nancy Merritt and James Yori. Present as well were Mary R. Schrider-Fox, Town Solicitor; Patricia J. Schuchman, Building Official; Linda Martin, Town Clerk; and Teresa Tieman, Town Manager. The Applicant appeared at the hearing and presented her application. Applicant's contractor, Keith Cherry of Cherry Innovations, also appeared and testified on behalf of Applicant.

**FINDINGS OF FACT**

The Applicant is the owner of residential property located at 1706 Bunting Avenue, within the corporate limits of the Town of Fenwick Island, Sussex County, Delaware. The property is also identified as Sussex County Tax Map and Parcel No. 1-34 23.08 24.00, one-half of Lot 11, Block K (hereinafter the "Property").

The Property is located on the west side of Bunting Avenue. The Property is 75 feet wide and is improved with a residential dwelling constructed by Zonko Builders, Inc., the location survey for which is dated December 11, 2006. Applicant purchased the Property with existing dwelling in 2017. The front of the dwelling is the east side of the dwelling and faces Bunting Avenue. The dwelling is a 2-story house on pilings with 4 bedrooms, a kid's lounge, laundry room, and 2 bathrooms on the first floor. A master bedroom with master bathroom, kitchen, great room and dining room are located on the second floor of the dwelling. The dwelling has covered decks on both the front and rear of the dwelling on the first floor. The dwelling has open decks on the front of the dwelling on the second floor, as well as an open deck and covered deck on the rear of the dwelling on the second floor.

Applicant desires to enclose the existing open deck on the rear of the dwelling on the second floor, which currently extends 10.7' off of the rear of the dwelling and encroaches 4.7' into the rear setback, which is permitted by Section 160-8.A.(10)(c) of the Zoning Code. Applicant's proposal is to enlarge and enclose said rear open deck so that it will measure 12' x 17'4" in size, resulting in the need for a variance of 7.3' from the rear yard setback required by

Section 160-8.C.(4)(a) of the Zoning Code. Without a variance, Applicant could enclose 4.7' of the rear open deck and still comply with the rear yard setbacks required by the Zoning Code.

According to Applicant, the Property is very shallow, leaving little room for an enclosed addition to the rear of the dwelling.

Applicant wants to extend the rear open deck on the second floor so that it will be even with the existing covered rear deck on the second floor for symmetry, useable space and aesthetic value.

According to Applicant, the extra space that will be provided by her proposed extension and enclosure of the rear open deck is necessary to accommodate the equipment that she utilizes for pain management, which takes up a lot of space.

As a result of an accident in September, 2018, Applicant suffers from neck and back issues. As evidenced by letters submitted by Applicant's doctors, treatment with an infrared sauna and traction machine are recommended and necessary for Applicant's pain management.

At present, Applicant has a traction machine in one of the first floor bedrooms of the dwelling. At present, Applicant does not have an infrared sauna located on the Property.

Applicant's desire is to install an infrared sauna in the dwelling. Having an infrared sauna that is large enough so that Applicant can lay down is not necessary, but it is helpful, to Applicant's pain management therapy. If Applicant is permitted to enlarge and enclose the existing open deck on the rear of the dwelling on the second floor, as proposed, such would allow Applicant to install an infrared sauna of sufficient size to lay down in, together with a traction machine, off of her master bedroom and master bathroom. Said location will allow for privacy while Applicant utilizes the infrared sauna and traction machine.

Installing the infrared sauna outside would result in corrosion due to the salt air and replacing the sauna in such an event would be too expensive.

Applicant plans on making the Property her primary residence. Doing so will require that she move her mother and her mother's caregiver to the Property. Her mother suffers from alzheimer's disease and requires constant care. Accordingly, 2 of the extra bedrooms on the first floor of the dwelling are not available to house Applicant's pain management equipment in the future, as they will be utilized by her mother and her mother's caregiver.

The other 2 extra bedrooms on the first floor of the dwelling are also not available to house Applicant's pain management equipment, as Applicant has 2 children who visit the Property often.

The kid's lounge on the first floor of the dwelling will also not be available for Applicant's pain management equipment because Applicant intends to use said room as an extra sitting room for her mother's caregiver. Additionally, said room is open to the entire household with part of the room functioning as a hallway to access some of the first floor bedrooms.



According to Mr. Cherry, Applicant's contractor, in order to install the desired infrared sauna, a corner of a room is needed. Although the kid's lounge and attached deck area would have enough space to accommodate the infrared sauna, it would be located off of the room Applicant's mother will reside in, which is not desirable. Such would also require cutting off some of the light coming into Applicant's mother's room, which is not good for dementia patients according to Applicant.

According to Mr. Cherry, it is possible to install the infrared sauna in Applicant's desired location on the second floor without the 7.3' variance being requested. However, reconfiguration of the closets in the master bedroom and further reconfiguration of the master bathroom will be necessary. A 2.3' variance will still be necessary as well.

The parcels of land surrounding the Property are also used for residential purposes.

The Board received 7 letters/emails from the public in support of the application and 3 letters/emails from the public in opposition to the application. All letters/emails received are part of the hearing record.

No comments from the public during the hearing, either in favor of or opposed to the application, were received. However, one comment favoring a compromise and some questions about the application for the Board's consideration were received from the public during the hearing.

## **CONCLUSIONS**

Pursuant to Section 160-13 of the Zoning Code of the Town of Fenwick Island, Delaware, the Board of Adjustment shall have the powers defined and conferred, and the limitations imposed, by Title 22 of the Delaware Code, Sections 321 through 327, inclusive. Said Sections 321 through 327 are included herein by reference.

Title 22 of the Delaware Code, Section 327(a)(3), provides that the Board of Adjustment 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 the 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.

Under Delaware case law, the Delaware Supreme Court has defined the two types of variances, "use" variances and "area" variances. The Board of Adjustment v. Kwik-Check Realty, Inc., Del. Supr. 389 A.2d at 1289, 1291 (1978). That court indicated that "a use variance

is a variance that changes the character of the zoned district by allowing the land to be used for a purpose otherwise proscribed by the zoning regulations.” Id. However, an area variance “does not involve a prohibited use, and ‘concerns only the practical difficulty in using the particular for permitted use.’” Id. at 1291. The variance requested in this instance is an area variance to which the “exceptional practical difficulty” standard applies.

The Board concludes that the Applicant does not face an exceptional practical difficulty in making normal use of the Property and that Applicant’s requested 7.3’ variance, or the alternative 2.3’ variance requested during the hearing, is unrelated to the land and not the minimum necessary to accommodate her desire to install an infrared sauna and traction machine.

The Board concludes that multiple other options are available to Applicant in that she could install a smaller infrared sauna and/or use other available space in the dwelling for the infrared sauna and traction machine.

The Board concludes that the requested dimensional change is purely personal and unrelated to the land, reflecting what Applicant deems to be the most convenient and desirable option and location for installation of an infrared sauna and traction machine. However, what is most convenient and desirable does not constitute an exceptional practical difficulty for which a variance can be granted.

The Board concludes that the spirit of the zoning ordinances will not be observed by granting the requested variance, as granting the variance will establish an unacceptable precedent that setback variances should and will be granted to accommodate personal desires and preferences.

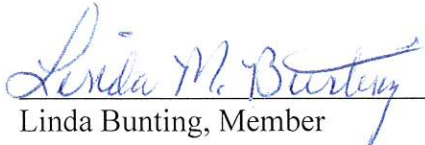
### **DECISION**

The Board, by a less than unanimous vote of 4 to 1, voted to deny the requested variance.

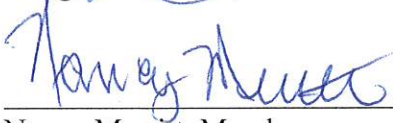
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BOARD OF ADJUSTMENT OF THE  
TOWN OF FENWICK ISLAND, DELAWARE

By:   
Tim Collins, Chairman

By:   
Linda Bunting, Member

By:   
Craig Lambertson, Member

By:   
Nancy Merritt, Member

By:   
James Yori, Member  
(Dissenting)

Date Filed with Town: 1-30-2020

Date Mailed/Emailed to Applicant: 1-30-2020