

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

**IN RE:**

**REQUEST FOR VARIANCE  
BY DWIGHT HURST**

**DECISION**

The Board of Adjustment of the Town of Fenwick Island (the “Board of Adjustment”) held a hearing on Tuesday, April 4, 2023, at 2:00 p.m. at the Town of Fenwick Island Town Hall, 800 Coastal Highway, Fenwick Island, DE 19944, to hear the request for variance of Dwight Hurst (the “Applicant”). Present for the Board of Adjustment were Chairperson Marlene Quinn, and members Paul Wilson, Elizabeth Lear, Robert Warburton and Ginger Burris, and counsel for the Board of Adjustment, Nicholas G. Kondraschow, Esq. Also present were Patricia Schuchman, Town Manager, Raelene Menominee, Town Administrator, Erin Ellinger, Administrative Assistant, and Luke Mette, Esq., Town Solicitor. The public hearing was attended by members of the public who were interested in the request for variance.

The Applicant is the owner of residential property located at 501 Glenn Avenue, Fenwick Island, DE 19944 (the “Property”), within the corporate limits of the Town of Fenwick Island, Sussex County, Delaware (the “Town”). The Property is also identified as Sussex County Tax Map and Parcel No. 1-34 23.16 157.00 Lot 248. The Property is located on the westerly side of Coastal Highway (State Route 1). To the east of the Property is a lagoon and/or canal 60 feet or less in width. The Property is improved by a residence and bulkhead.

On February 3, 2023, Mr. Hurst sent a letter to the Town stating that “[t]his letter shall serve as my official variance request on the dock installed at 501 Glenn Avenue.” Mr. Hurst presented his request for a variance at the hearing. As part of his presentation, he handed out a packet that included his Exhibits 1, 2, 3, 3(a), 4, 5, 5(a)-(c), 6, 6(a)-(f) and 7. Mr. Hurst had not provided the packet or exhibits to the Board in advance of the hearing and therefore they were not available to people remotely participating in the hearing. Mr. Hurst stated that he was seeking a variance because of the unique physical circumstances or condition of his Property and the canal adjacent to his Property. He referred the Board to his Exhibit 2 and stated that those unique circumstances were the angle of the canal, the drainage pipe going into the canal and the riprap in the canal. Mr. Hurst referred the Board to his Exhibit 3 and exhibits thereafter and stated that there was unnecessary hardship for exceptional practical difficulty not to have a triangle shaped dock because it is difficult to dock a boat against the bulkhead at the Property. Mr. Hurst then stated that the Property could not be developed in strict conformity with the current zoning ordinance without a variance because he could not build a dock. He referred the Board to his Exhibit 4 and indicated that the variance was necessary to enable reasonable use of the Property because the practical difficulty is due to the uniqueness of the canal shape, which makes it difficult to dock a boat and would provide extreme hardship to attach a boat to the bulkhead. Mr. Hurst referred the Board to his Exhibit 5 and exhibits thereafter and stated that the unique circumstances of the canal – the pipe, rip rap and shallowness – were not created by

him. Mr. Hurst referred the Board to his Exhibit 6 and exhibits thereafter and indicated that the variance will not alter the essential characteristics of the neighborhood because the dock looks like it's part of the neighborhood. Mr. Hurst referred the Board to his Exhibits 4 and 6 and stated that the variance would not substantially or permanently impair the appropriate use of the adjacent properties because a variance would provide a safer use of the waterway for all the properties and without the variance it would be difficult and dangerous to dock a boat. Mr. Hurst stated that the variance would not be detrimental to the public welfare because it would provide a safer boating experience for all. Mr. Hurst referred the Board to his Exhibit 7 and indicated that the request for a variance was minimal because the design of the dock was to minimize the area of the dock over the waterway. Finally, Mr. Hurst indicated that the variance was necessary to afford relief because, due to the unique layout of the canal, the angle, the riprap and the pipe, it was difficult to dock a boat at his Property. Mr. Hurst then concluded his presentation.

Chairperson Marlene Quinn asked Mr. Hurst what the width of the canal was. Mr. Hurst stated that it was 43 to 49 feet in width. Mr. Paul Wilson asked Mr. Hurst if he had created the hardship by building the dock without permission and in violation of the Town of Fenwick Island Code. Mr. Hurst stated that the hardship was caused by the unique physical circumstances and condition of the canal. Town Solicitor Luke Mette asked Mr. Hurst what the source of the legal standards were that Mr. Hurst referred to in his presentation. Mr. Hurst was not able to identify a legal source for the standards.

Frank **Nowak**, owner of 21 Bayside Drive, Fenwick Island, DE 19944, stated that Mr. Hurst's lot had been unimproved for 60 years, it was tough to get a boat in there and it was maybe the kind of property where you could put in some kayaks or canoes. Mr. Nowak wondered whether docking a boat in Fenwick Island was a right if your property happened to be adjacent to water.

Town Solicitor Luke Mette asked Patricia Schuchman about Mr. Hurst's February 3, 2023 letter requesting a variance. He noted that Mr. Hurst's request for a variance stated that the Town had issued Mr. Hurst a permit for his dock. He asked Ms. Schuchman, the Town Manager and acting Building Official at the relevant time, whether the Town had issued Mr. Hurst a permit for his dock. She said no. He asked Ms. Schuchman if the Town had approved Mr. Hurst's dock. She said no. He asked Ms. Schuchman whether the Town had issued a stop-work order while Mr. Hurst was building his dock. She said yes. He asked Ms. Schuchman whether Mr. Hurst complied with the stop-worker order or completed the dock. She said he completed the dock. He asked if the dock was at the end of the canal. Ms. Schuchman said it was. He asked Ms. Schuchman how far the dock extended past the bulkhead. She said 9 feet. Mr. Mette noted that the request for a variance stated that Mr. Hurst followed the appropriate procedure for building the dock. Mr. Mette asked Ms. Schuchman if Mr. Hurst had followed the appropriate procedure for building the dock. She said no. Mr. Mette noted that the dock violated Town Code Section 160-8(B)(1) and (2). Section 160-8(B)(1) provides that docks are not permitted in canals that are 60 feet or less in width and no docks are permitted at the end of a canal. Mr. Mette also noted that even if the canal was more than 60 feet in width, the dock violated Town Code Section 160-8(B)(2) which provides that no docks may extend more than 4 feet past the

bulkhead line. Chairperson Quinn asked Mr. Hurst if he was aware of these restrictions when he purchased the Property. Mr. Hurst said he was.

In closing, Mr. Hurst stated that he answered the questions he needed to, the Property is a unique lot and he was making sure it doesn't hurt other properties, the community, and makes it a safer, better opportunity to boat. Mr. Mette stated that the Town did not issue a permit for the dock, it issued a stop-work order which was not followed, the prior decision of the Board found that Mr. Hurst did not follow the proper procedures in building his dock and that the dock violated the Town Code, Mr. Hurst did not appeal that decision, Mr. Hurst's request for a variance was untimely, Mr. Hurst did not establish the legal standard for the variance, the legal standard for a variance is contained in the Delaware Code, Title 22, Section 327 and the Delaware Supreme Court's decision in *Kwik-Check*, Mr. Hurst did not meet those standards, the dimensional change under Mr. Hurst's variance request was not minimal, the harm to Mr. Hurst if the variance was denied is not greater than the probable effect on neighbors if it is granted, Mr. Hurst's putative harm is that the Property would sell for more with a dock, Mr. Hurst's putative harm is entirely of his own making by building a dock without a permit which he exacerbated by ignoring a stop-work order, a dock is not a "normal improvement" to a residence, the purpose of 160-8(B)(1) is stated in the ordinance and is for safety, and Mr. Hurst's request for a variance should be denied.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Mr. Hurst seeks an area variance for his dock. Mr. Hurst's dock is in a canal that is less than 60 feet and is at the end of the canal. Mr. Hurst's dock extends 9 feet past the bulkhead line. Mr. Hurst seeks a variance from Town Code Sections 160-8(B)(1) and (2). Those sections provide:

- B. Regulations for structures such as but not limited to docks, piers, wharves, boat ramps, steps, boat houses, gazebos, piling and navigational aids in lagoons and canals.
  - (1) In order to provide clear, safe and unobstructed operation of watercraft in lagoons or canals 60 feet or less in width within the corporate limits of Fenwick Island, Delaware, no structure such as but not limited to docks, piers, wharves, boat ramps, steps, boat houses, gazebos, piling and navigational aids shall be constructed which project beyond the bulkhead line of such lagoon or canal. Davits shall be permitted, provided that they shall not project over the waterways more than 12 feet from the bulkhead and, when not in use, they shall be retracted to a line at least four feet parallel to the bulkhead. This installation shall require a building permit.
  - (2) In all lagoons or canals in excess of 60 feet in width, such structures may be permitted to extend into the lagoon or canal a distance of not more than four feet beyond the bulkhead line. No construction of any kind is permitted to extend beyond the

bulkhead line at the end of a lagoon or canal. Boat lifts shall be permitted, provided that the outside frame of said lift does not protrude more than 12 feet from the bulkhead and the perimeters of submerged boat lifts shall be clearly identified by reflectors so as not to be a hazard to boat traffic. Boat lifts shall be securely anchored and such installation shall require a building permit. Davits shall be permitted, provided that they shall not project over the waterways more than 12 feet from the bulkhead and, when not in use, they shall be retracted to a line at least four feet parallel to the bulkhead. This installation shall require a building permit.

The Board's power to grant variances derives from Title 22, Section 327(a)(3) of the Delaware Code. That section states:

(a) The board of adjustment may:

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(3) 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; provided, however, that notwithstanding any provision of law to the contrary, the legislative body of any city or incorporated town may, by ordinance, vest a designated town official or department with authority to administratively grant a dimensional variance for existing conditions that do not exceed 1 foot of the required dimension restrictions without the application being considered by the board of adjustment, subject to the standards, procedures and conditions set forth in the ordinance granting such authority.

The Delaware Supreme Court in *Board of Adjustment of New Castle County v. Kwik-Check Realty, Inc.* set forth the standard for area variances, also known as the "exceptional practical difficulty" test:

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 the restriction upon the applicant's property were removed, such removal would seriously affect such neighboring property and uses; 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 a permitted use under the use provisions of the ordinance.

389 A.2d 1289, 1291 (Del. 1978). Under the fourth factor of the exceptional practical difficulty test, two issues arise: (1) whether the requested dimensional change is minimal, and (2) whether any alleged hardship is self-created.<sup>1</sup>

Mr. Paul Wilson found that Mr. Hurst's dock is not permitted by the zoning ordinances applicable to the Property, Mr. Hurst's dock is not consistent with the character of the neighborhood and allowing the dock would have an adverse effect on the safety of the neighboring properties with respect to their use of the canal. Mr. Wilson noted that the purpose of the restrictions in Section 160-8(B), in particular, not allowing construction at the end of the canal, was for safety. Mr. Wilson also found that any alleged hardship to Mr. Hurst had been self-created since Mr. Hurst built the dock without a permit or approval. Mr. Wilson voted against granting Mr. Hurst a variance for his dock. Mrs. Elizabeth Lear found that Mr. Hurst's dock was not permitted by the zoning ordinances applicable to the Property, Mr. Hurst's dock is out-of-character for the neighborhood and that Section 160-8(B) was enacted for safety and Mr. Hurst's dock at the end of the canal created a safety hazard. Mrs. Lear also found that any alleged hardship to Mr. Hurst was self-created because Mr. Hurst had not gotten a permit for the dock. Mrs. Lear voted against granting Mr. Hurst a variance for his dock. Mr. Robert Warburton found that the dock was not permitted by the zoning ordinances applicable to the Property, that the dock was out-of-character for the neighborhood, including that it extended 9 feet past the bulkhead line and that if the dock were permitted, it would cause a hardship to Mr. Hurst's neighbors in using the canal and navigating boats in the canal. Mr. Warburton also found that any alleged hardship to Mr. Hurst was self-created, including because the relevant zoning ordinances were available to Mr. Hurst who could have followed them. Mr. Warburton voted against granting Mr. Hurst a variance for the dock. Mrs. Ginger Burris found that the dock violated Section 160-8(B) because the canal was less than 60 feet in width and the dock was at the end of the canal. Mrs. Burris also found that the dock was inconsistent with the neighborhood and that if the restrictions were removed, it would be to the detriment of Mr. Hurst's neighbors whose use of the canal would be impaired. Mrs. Burris further found that any alleged hardship to Mr. Hurst was self-created and could have been mitigated if Mr. Hurst had followed the stop-work order. Mrs. Burris voted against granting Mr. Hurst a variance for the dock. Chairperson Marlene Quinn noted that the canal adjacent to Mr. Hurst's Property may be unique, but Mr. Hurst was aware of that when he purchased the Property. Mrs. Quinn found that the dock was not permitted by the zoning ordinances applicable to the Property and was inconsistent with the character of the neighborhood, including because the dock extended 9 feet past the bulkhead line and the canal was considerably less than 60 feet wide. Mrs. Quinn also found that if the dock was permitted, it would affect the neighboring properties, noting that none

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<sup>1</sup> *Mesa Communications Group, L.L.C. v. Kent County Bd. of Adjustment*, 2000 WL 33110109, at \*6 (Del. Super.); *Janaman v. New Castle County Bd. of Adjustment*, 364 A.2d 1241, 1243 (Del. Super.); *McKinney v. Kent County Bd. of Adjustment*, 2002 WL 1978936, at \*8 (Del. Super.); *Baker v. Connell*, 488 A.2d 1303, 1308 (Del. 1985); *Wawa, Inc. v. New Castle County Bd. of Adjustment*, 929 A.2d 822, 834 (Del. Super. 2005); *Lowes Home Centers, Inc. v. Sussex County Bd. of Adjustment*, 2001 WL 1729123, at \*10 (Del. Super.); *Hollowka v. New Castle Bd. of Adjustment*, 2003 WL 21001026, at \*7 (Del. Super.).

of Mr. Hurst's neighbors had voiced support for the dock or stated that it was in conformity with the neighborhood. Mrs. Quinn added that Mr. Hurst had not followed the proper procedure or obtained a permit to build the dock. Finally, Mrs. Quinn noted that the dimensional change Mr. Hurst sought was not minimal because the dock extended 9 feet past the bulkhead line. Mrs. Quinn voted against granting Mr. Hurst a variance for his dock.

Accordingly, the Board voted unanimously (5-0) to deny Mr. Hurst's request for a variance for his dock.

BOARD OF ADJUSTMENT OF THE  
TOWN OF FENWICK ISLAND

By: \_\_\_\_\_  
Marlene Quinn, Chairperson

By: \_\_\_\_\_  
Paul Wilson, Member

By: \_\_\_\_\_  
Elizabeth Lear, Member

By: \_\_\_\_\_  
Robert Warburton, Member

By: \_\_\_\_\_  
Ginger Burris, Member

Date Filed with Town: \_\_\_\_\_

Date Mailed/Emailed to Applicant: \_\_\_\_\_