

**BEFORE THE BOARD OF ADJUSTMENT OF THE
TOWN OF HENLOPEN ACRES**

IN RE: :
 :
APPLICATION OF STEPHEN and :
SUSIE CANTON :

DECISION OF THE BOARD OF ADJUSTMENT

The Board of Adjustment of the Town of Henlopen Acres convened at 10:00 a.m. on Friday, June 30, 2023, in the Henlopen Acres Town Hall, to consider the Application of Stephen and Susie Canton. Present from the Board of Adjustment were Chairperson Wendy Jacobs, and Board members, Leigh Jamison, Norma Lee Derrickson, Ashley Reed Hidell and Harriet Hertrich. Also present were Richard E. Berl, Jr., Esquire, Counsel to the Board of Adjustment and Town Manager Thomas A. Roth.

ISSUE

The purpose of the public hearing was to allow the Board of Adjustment to consider an appeal from a determination of the building official, as well as five (5) potential variance requests. The appeal involved the interpretation and application of Section 130-20 of the Henlopen Acres Code.

FINDINGS OF FACT

1. The Applicants, Stephen and Susie Canton, are the owners of property at 23 Tidewaters, also identified as Block R, Lot 2. The Lot measures 100 feet by 165 feet, backing up to Sandy Bottoms Lagoon. The property is currently improved by a dwelling owned by the Applicants since 1999, and which they wish to expand and modernize with a new dwelling which has triggered the request for variances from existing Code limitations.

2. The Applicants' attorney, Scott Wilcox, Esquire, directed the presentation. In that regard he submitted an Exhibit Book addressing each of the variance requests and the appeal. He described the general plan to utilize the existing footprint, but to add 446 square feet. Lot coverage of the dwelling and accessory structures would increase, and the plan would include a new pool, patio and a pool house.

3. According to the Applicant, the house will be 90 feet from the road. The expansion is primarily to the sides and rear of the house and property.

4. The Board first considered the appeal, as the outcome would determine what, if any, variances would be necessary. In that regard Section 130-20 of the Code reads as follows:

“The front yard shall extend back from the property line a distance that is the average setback distance of the two nearest dwellings on each side of the lot under review. However, if the average setback distance of the two nearest dwellings on each side of the lot under review is less than 20 feet, then the front yard shall extend back from the property line a minimum distance of 20 feet. If the average setback distance of the two nearest dwellings on each side of the lot under review is more than 40 feet, then the front yard shall extend back from the property line a minimum distance of 40 feet.”

The current structure is situated 23 feet from the property line, but the Applicant wishes to set the front at the minimum 20 feet. The Applicants advocate an interpretation of the Code to mean the average of one property on the west side (Lot 1), and one property on the east side (Lot 3). That would create an average of 32.2 feet, and require a variance of 12.2 feet. The Applicant also suggested that the property at 25 Tidewaters (Lot 1) not be considered because it was something of an “anomaly” – a home that was permitted in error, and with a large front setback. As such, the Applicants wish to base their front yard setback solely on the location of the property at 21 Tidewaters (Lot 3), which is just under 20 feet, and would not require relief. If the Town’s interpretation is accepted, the average is 33.5 feet, and a variance of 13.5 feet would be required.

5. Mr. Roth briefly explained the history of the Section. When the Code was first adopted in 1974, the front yard setback was calculated in a different manner. That Section was amended in 2001 and required consideration of six existing lots on the same side of the street as the lot under review. In 2003, the Section was amended to the current language. Since that time, the Town has interpreted and applied the ordinance so as to utilize the two adjacent lots on both sides of the dwelling under consideration. As such, in this instance, dwellings at 19 and 21 Tidewaters, located to the west of the Canton dwelling, and properties at 25 and 27 Tidewaters, both to the east of the Canton dwelling, are being considered.

6. Section 130-19(D) limits the buildable area of a Lot to no more than 20%. The Applicant wishes to extend that by 445 square feet, or 2.7%. It was explained that much of the additional lot coverage requested by the Applicants will be in the rear of the property, with limited visibility. The Applicants’ architect, Greg Grieser, described

photographs submitted by the Applicants, and the drawings submitted by the Applicants showed a planned pool, a pool house, an outdoor shower, and a raised patio, in addition to the new dwelling.

7. Section 130-19(G) limits maximum allowable accessory coverage to 20% of the Lot, which the Applicants wish to exceed by 215 square feet, or 1.3%. It was pointed out that the need for additional square footage is a result of accessory structures such as the pool, paver patio, and outdoor shower, all of which will be located in the rear of the property, and generally unseen from the front.

8. Section 130-19(H) requires that at least 60% of the Lot be maintained as open space in its natural state, or formally landscaped. The Applicants are seeking to reduce that by 660 square feet, or 4%. The need for this variance is essentially triggered by the previous two requests, as there are three code sections addressing lot coverage for which variances are necessary to implement the Applicants' plan.

9. Section 130-22 requires a rear yard setback of 20 feet exclusive of the width of any easement or bridle path. Like many lots in Henlopen Acres, the Applicants' lot includes a 10-foot-wide bridle path/utility easement. The path, which amounts to approximately 2,400 square feet, is owned by the Town of Henlopen Acres, but, as is typical in the Town, has been maintained by the property owner. The Applicants argued that were that property considered part of their Lot, all but one of the variances being requested would have been unnecessary. Because they do not own the property, however, a 13.5-foot variance from the rear property line is necessary. The Applicants pointed out that at the deepest point, new construction will be well over 20 feet from the edge of their bulkhead, and will be largely unseen from the front of the property.

10. The application generated a great deal of interest in the Town, reflected in the numerous letters and emails both in favor and against the application. Several individuals also appeared in person to comment on the application.

11. With respect to the interpretation of Section 130-20, the Board concluded that the Town's interpretation following the 2003 amendment was consistent with the language of the Code. By referencing the phrase "on each side of the Lot under review", the Code was clearly directing that the average be calculated as something of a "line of sight" taking into account properties on both sides. In addition, eliminating consideration of a dwelling because it had been mistakenly approved would ignore the line of sight and create additional issues. The Board therefore approved the interpretation by the Town building official.

12. As a result of the Board's approval of the Town's interpretation of Section 130-20, in voting to deny the variance request under that Section the Board members pointed out that the 13.5-foot request was more than the minimum necessary to afford relief and would set a bad precedent. Indeed, with the interpretation of the Town having been accepted, there would be no need for any variance if the front setback was properly established.

13. As to the requests under Sections 19(D), 19(G), and 19(H), the Board recognized the Code's attempt to preserve open space throughout the neighborhood, and that the Applicants' plan would be easy to "tweak" in order to comply with Code requirements. It was recognized that the character of the Town had been established in part by efforts to preserve open space. It was noteworthy that the Applicants' requested pool was 40 feet in length, and that the general plan included a sizeable pool house, and a 25-foot-wide driveway. In essence, the improvements could be minimized, the property could be developed without variances requested, and the requests did not meet the standard for an exceptional practical difficulty.

14. With respect to the rear yard setback request under Section 130-22, the Board noted that there was nothing unique about bridle paths, which exist throughout the Town. Once again, the large pool shown on the Applicant's plan was part of the discussion, which was characterized as a "want", and not something that was necessary. Further, the Board determined that the request was more than the minimum necessary to provide relief, and that the property could clearly be developed without the variance. The Board determined that the Applicants had not met the exceptional practical difficulty test, and that in many instances the requested variances were a result of situations that have been, or will be, self-created.

CONCLUSIONS OF LAW

The Board upheld the Town's interpretation of the front yard setback, and determined that the Applicants had failed to meet the standards for granting the other variances, and were therefore not entitled to relief.

DECISION

The Board voted unanimously to accept the Building Official's interpretation of Section 130-20. The variance requests were denied unanimously, with the exception of the variance under Section 19(D), which was denied by a vote of 4-1.

BOARD OF ADJUSTMENT OF THE
TOWN OF HENLOPEN ACRES

Dated: 8-17-2023

By: Nancy L. Jacobs
Chairperson

Dated: 8-17-2023

James Ken Hill
Member

Dated: 8-18-2023

Lugh C Jamison
Member

Dated: 8-21-23

Kelly Westrich
Member

Dated: 22-8-23

Prudence Burton Demick
Member