

BEFORE THE BOARD OF ADJUSTMENT OF SUSSEX COUNTY

IN RE: LOUIS CAPANO, JR.

(Case No. 12242)

A hearing was held after due notice on December 17, 2018. The Board members present were: Mr. Dale Callaway, Ms. Ellen Magee, Mr. Bruce Mears, Mr. John Mills, and Mr. Brent Workman.

Nature of the Proceedings

This is an application for a variance from the maximum fence height requirement and the side yard setback for existing structures.

Findings of Fact

The Board found that the Applicant is seeking a variance of 4.9 feet from the ten (10) feet side yard setback requirement on the north side for an existing generator, a variance of 5.1 feet from the ten (10) feet side yard setback requirement on the north side for an existing HVAC unit, a variance of 4.6 feet from the ten (10) feet side yard setback requirement on the north side for an existing HVAC unit, a variance of 4.8 feet from the ten (10) feet side yard setback requirement on the north side for an existing HVAC unit, a variance of 4.7 feet from the ten (10) feet side yard setback requirement on the north side for an existing HVAC unit, a variance of 4.8 feet from the ten (10) feet side yard setback requirement on the north side for an existing HVAC unit, a variance of 4.8 feet from the ten (10) feet side yard setback requirement on the north side for an existing HVAC unit, a variance of 4.9 feet from the ten (10) feet side yard setback requirement on the north side for an existing HVAC unit, a variance of 4.9 feet from the ten (10) feet side yard setback requirement on the north side for an existing HVAC unit, and a variance of 1 foot from the maximum height requirement of 3.5 feet for a proposed wall / fence in the front yard. This application pertains to certain real property on the east side of East Lake Drive approximately 900 feet south of Queen Street (911 Address: 21436 East Lake Drive, Rehoboth Beach) said property being identified as Sussex County Tax Map Parcel Number: 3-34-20.10-1.08.

1. The Board was given copies of the Application, a building permit application, a temporary certificate of compliance, a survey of the Property dated September 13, 2018, aerial photographs of the Property, and a portion of the tax map of the area.
2. The Board found that the Office of Planning & Zoning received no correspondence in support of or in opposition to the Application.
3. The Board found that Jim Katelan was sworn in to testify about the Application and he submitted exhibits for the Board to review.
4. The Board found that Mr. Katelan testified that the Property is unique due to its narrowness and the home sits on the side yard setbacks. The Property is only 75 feet wide.
5. The Board found that Mr. Katelan testified that the air-conditioning units could not be placed anywhere else on the property at the time of construction. The units measure 3 feet by 3 feet and the manufacturer requires 30 inches of service clearance. He stated that the units were placed as close to the house as possible.
6. The Board found that Mr. Katelan testified that the house was designed by an architect. Mr. Katelan signed for the building permit but he was unaware that the HVAC units encroached into the setback area. In fact, he did not realize the encroachments of the HVAC units until he received a violation notice from Planning & Zoning.

7. The Board found that Mr. Katelan testified that the units cannot be placed in the rear yard due to the DNREC building line restrictions.
8. The Board found that Mr. Katelan testified that the pool is located in the front yard and the height variance is for the wall around the pool. The wall is for privacy and the Applicant argued that he needs a fence of 4 feet tall for the pool. The fence has not yet been built but has been approved by the homeowners association.
9. The Board found that Mr. Katelan testified that the wall was designed for security, safety, and curb appeal.
10. The Board found that Mr. Katelan testified that pedestrians walk in the front yard.
11. The Board found that Mr. Katelan testified that the Applicant's son owns an adjacent property
12. The Board found that Mr. Katelan testified that the variances will not alter the character of the neighborhood as there is a fence and trees on that side of the Property.
13. The Board found that Mr. Katelan testified that the front part of the Property goes to the lake and includes a road.
14. The Board found that Mr. Katelan testified that the variances requested are the minimum variances necessary to afford relief.
15. The Board found that Thomas Connelly was sworn in to give testimony in opposition to the Application. Mr. Connelly testified that the architect should have been aware of the setback rules and that the Applicant is not entitled to a pool. He argued that there is no exceptional practical difficulty and that the Property could be built in strict conformity with the Code. He also expressed concern that the structures could increase the risk of fire in the neighborhood, block views, and affect property values.
16. The Board found that Mr. Katelan testified that a mistake was made and the house is finished.
17. The Board found that Mr. Katelan testified the units cannot be placed in the rear yard due to the DNREC restrictions.
18. The Board found that no parties appeared in support of and one (1) party appeared in opposition to the Application.
19. The Board voted to leave the record open for the limited purpose of allowing the Applicant to submit building plans and to testify about those plans. The Applicant subsequently submitted building plans for the house and the Board held a hearing on January 7, 2019. At that hearing Mr. Katelan testified that the building plans were given to the surveyor and he relied on the surveyor to properly stake out the setback areas.
20. Based on the findings above and the testimony and evidence presented at the public hearing and the public record, which the Board weighed and considered, the Board determined that the application for the side yard variances met the standards for granting a variance. The findings below further support the Board's decision to approve the side yard variance requests.
 - a. The Property is unique as it is a narrow lot measuring only 75 feet wide. The Property is also constrained by DNREC building restriction lines to the east which greatly limit the developable area of the east side of the lot. The west side of the lot is also constrained since East Lake Drive occupies a portion of the front yard. East Lake Drive actually bisects a portion of the Property. These conditions have resulted in an exceptionally limited building envelope. It is clear to the Board that the lot's unique characteristics have created an exceptional practical difficulty for the Applicant who seeks to retain existing HVAC units and a generator on the lot.
 - b. Due to the uniqueness of the lot, the Property cannot be developed in strict conformity with the Sussex County Zoning Code. The Property is limited due to its size, narrowness, the DNREC building restriction line, and the location of East Lake Drive. These conditions greatly limit the building

envelope. The Applicant seeks to retain reasonably sized HVAC units and a generator but is unable to do so without violating the Sussex County Zoning Code. The Board is convinced that the variances for those structures are necessary to enable the reasonable use of the Property as the variances will allow the Applicant to retain the structures on the Property. The Board is convinced that the location of the HVAC units and generator are also reasonable, which is confirmed when reviewing the survey provided by the Applicant.

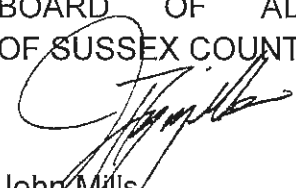
- c. The exceptional practical difficulty was not created by the Applicant. The Applicant did not create the shape, size, and unusual conditions of the lot. The unique characteristics of the Property are clear when reviewing the survey. The Board also notes that the Applicant relied on professionals to construct the structures on the Property only to later discover the encroachments. The Board is convinced that the exceptional practical difficulty was not created by the Applicant but was created the lot's unique characteristics.
 - d. The variances will not alter the essential character of the neighborhood nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare. The Board is convinced that the HVAC units and generator will have no effect on the character of the neighborhood. These structures are structures normally found with homes and they only slightly encroach into the setback areas beyond the allowable encroachment limits for such units. The opposition expressed concerns about the effect on views and property values but the opposition presented no evidence such as photographs or studies to support these arguments. It is difficult for the Board to see how the variances for these structures would somehow alter the essential character of the neighborhood or be detrimental to the public welfare. The opposition also presented arguments about the possible spread of fire but these arguments appeared speculative in nature.
 - e. The variances are the minimum variances necessary to afford relief and the variances requested represent the least modifications possible of the regulations at issue. The Applicant has demonstrated that the variances sought will allow the Applicant to retain the HVAC units and generator on the Property. No additions or modifications to those structures are proposed.
21. Based on the findings above and the testimony and evidence presented at the public hearing and the public record, which the Board weighed and considered, the Board determined that the application for the height variance failed to meet the standards for granting a variance. The findings below further support the Board's decision to deny the height variance request.
- a. The Applicant failed to convince the Board that the fence could not be constructed in strict conformity with the Sussex County Zoning Code. The fence has not yet been constructed and the Applicant did not demonstrate that, due to the uniqueness of the Property, a fence could not be constructed at a height which complied with the Code. Furthermore, the Board was not convinced that a fence which is taller than allowed under the Code is necessary to enable reasonable use of the Property.
 - b. Since the fence could be constructed in strict conformity with the Code, the variance for the fence height variance was not the minimum variance necessary to afford relief. Rather, no variance is needed.

The Board granted the variance application in part finding that the side yard variance requests met the standards for granting a variance and the Board denied the variance application in part finding that the fence height variance request did not meet the standards for granting a variance.

Decision of the Board

Upon motion duly made and seconded, the variance application was approved in part and denied in part. The Board Members in favor of the motion were Mr. Dale Callaway, Ms. Ellen Magee, Mr. Bruce Mears, Mr. John Mills, and Mr. Brent Workman. No Board Member voted against the Motion to approve the variance application in part and to deny the variance request in part.

BOARD OF ADJUSTMENT
OF SUSSEX COUNTY



John Mills
Chairman

If the use is not established within two (2) years from the date below the application becomes void.

Date March 5, 2019.