

BEFORE THE BOARD OF ADJUSTMENT OF SUSSEX COUNTY

IN RE: THOMAS F. DUNKIN & BETTIE J. DUNKIN

(Case No. 12383)

A hearing was held after due notice on November 18, 2019. The Board members present were: Dr. Kevin Carson, Ms. Ellen Magee, Mr. John Williamson, and Mr. Brent Workman.

Nature of the Proceedings

This is an application for variances from front yard setback and corner front yard setback requirements for a proposed pool and a proposed structure and a variance from the fence height requirement for a proposed fence.

Findings of Fact

The Board found that the Applicants are requesting a variance of 3 feet from the thirty (30) feet front yard setback requirement for a proposed shed and a variance of 18 feet from the thirty (30) feet front yard setback requirement for a proposed pool. In addition, the Applicants requested a 2.5 foot variance from the 3.5 foot height requirement for a proposed fence. For purposes of clarity, Arrow Drive is considered the front yard of this property. This application pertains to certain real property located on the northeast corner of Arrow Dr. and Trails End Dr. within the Blackwater Village subdivision (911 Address: 34023 Arrow Drive, Dagsboro); the property being identified as Sussex County Tax Map Parcel Number 1-34-11.00-263.00. After a hearing, the Board made the following findings of fact:

1. The Board was given copies of the Application, a survey of the Property dated November 30, 2013, a survey of the Property dated December 15, 2017, survey with projected placement of pool, structure and fence, pictures of the Property and view from road, an aerial photograph of the Property, approval letter from residents of Blackwater Village, and a portion of the tax map of the area.
2. The Board found that the Office of Planning & Zoning received two letters in support of the Application and no correspondence in opposition to the Application.
3. The Board found that Thomas F. Dunkin and Bettie J. Dunkin were sworn in to give testimony about the Application and submitted exhibits including property surveys.
4. The Board found that Mr. Dunkin testified that they bought 2 adjacent lots in 2015 and later purchased a third lot. When the 3 lots were separate lots, Lot 1 and Lot 2 fronted on Trails End and Lot 3 fronted on Arrow Drive. Consequently, the building setback for the area where the pool, shed, and fence were to be located was 30 feet from Trails End and 15 feet from Arrow Drive.
5. The Board found that Mr. Dunkin testified that, in 2017, they combined the three lots into 1 lot causing the entire south side of the property located along Arrow Drive to be considered a the front yard with a 30 foot setback and the yard along Trails End to be considered the corner front yard with a 15 foot setback. The Applicants further testified that they were not aware of the change until they submitted the plans for the construction of the pool.
6. The Board found that Mr. and Mrs. Dunkin testified that the pool and shed encroach into the front yard setback along Arrow Drive and the proposed fence is higher than is permitted.
7. The Board found that Mr. Dunkin testified that the Property is unique because of its narrowness and because part of the lot is considered wetlands. The Applicants are attempting to locate the pool away from the wetlands.

8. The Board found that Mr. and Mrs. Dunkin testified that the Property is also unique as the northwest side of the property drains along a swale into wetlands. As such, the Applicants argued that the proposed location of the pool is the only location that the pool could be constructed.
9. The Board found that Mr. and Mrs. Dunkin testified that a garage has also been built on the northwest side of the Property further limiting the area to locate the pool, shed, and fence away from Arrow Drive. They argued that they would not be able to use the garage if the pool was moved closer to the garage.
10. The Board found that Mrs. Dunkin testified that firewood is delivered to the Property and they need area for egress near the pool for deliveries.
11. The Board found that Mrs. Dunkin testified that the Property is in a wooded community adjacent to a nature preserve and that the homeowners association documents prohibit the cutting of the trees in the back part of the Property, which further limit the location of the pool, shed, and fence. According to Mr. Dunkin, the Applicants are trying to hide the pool behind a grove of trees.
12. The Board found that Mrs. Dunkin testified that the Property is served by a septic system located between the garage and the proposed pool and that the Property is served by 2 wells near the garage and house respectively.
13. The Board found that Mrs. Dunkin testified that the proposed structures will not alter the essential character of the neighborhood as the Property is adjacent to 2 dead-end roads and a nature preserve and is the last property in the neighborhood.
14. The Board found that Mr. Dunkin testified that the shed will be used for pool equipment. He would prefer not to place the patio and shed on the other side of the pool but he noted that the patio could be smaller. Mrs. Dunkin testified that the shed could be moved into compliance but they prefer to keep the shed in its proposed location for aesthetic reasons.
15. The Board found that Mr. Dunkin testified that the Applicants explored other locations for the pool but chose this location because the ground is higher.
16. The Board recognized the testimony of Gary Hornbacher who is a neighbor and supports the Application because it will preserve the northwest corner drainage area, the trees behind the lot will not be cut, the Application is limiting the construction of structures of the Property, and the fence will not obstruct the view of the traveling public on Arrow Drive.
17. The Board found that one (1) party appeared in support of the Application and no parties appeared in opposition to the Application.
18. The Board voted to table the case until December 2, 2019, at which time the Board discussed and voted on the Application.
19. 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 variances for the proposed pool and a proposed structure failed to meet the standards for granting a variance. The findings below further support the Board's decision to deny those variance requests.
 - a. The Applicants failed to prove that a reasonably sized pool and shed could not be built in strict conformity with the Sussex County Zoning Code. The Applicants admitted that the shed could be moved into compliance but chose to keep it in this location due to aesthetic reasons. Likewise, the Applicants failed to convince the Board that the pool could not be located elsewhere on the property without a variance. The Property is a large lot consisting of 38,518 square feet, more or less. While the Applicants argued that there are drainage concerns, the Applicants did not convince the Board that the pool could not be turned or otherwise placed on the lot in compliance with the Code. Rather, the proposed location of the pool appears to be designed to allow the Applicants to otherwise use portions of

their lot for other purposes. Ultimately, the Applicants failed to convince the Board that the structures could not be constructed in compliance with the Code. Perhaps these structures would not be in the exact location where the Applicants want them to be located but the Property appears to have a large enough building envelope for the Applicants to place these structures in compliance with the Sussex County Zoning Code. For these reasons, the Board finds that the Property could be developed in strict conformity with the Code and that the variances for these structures are not necessary to enable reasonable use of the Property.

- b. The Board finds that the Applicants created their own exceptional practical difficulty by proposing to place the pool and shed which do not fit within the building envelope. The Board was not convinced that there is an unusual condition to the Property which has created this difficulty. The building envelope appears to otherwise be able to fit these structures without the need for the variances and the Applicants clearly testified that the shed could be moved into compliance. Likewise, the Board was not convinced that the pool could not be otherwise located on the lot. The Board was not convinced that the variance requests for those structures were the product of a *need*. Instead, those variance requests appear to be the product of a *want* as the Applicants seek to place those structures outside the building envelope for purposes of convenience, profit, and / or caprice. Since the Applicants can place those structures on the lot in compliance with the Sussex County Zoning Code, the need for the variances is something created by the Applicants' wants rather than an unusual physical condition relating to the Property. The Applicants have thus created their own exceptional practical difficulty.
 - c. Since the variances for the pool and shed are not necessary to enable the reasonable use of the Property, the Board also finds that the variances requested for the pool and shed are not the minimum variances necessary to afford relief. Furthermore, the Board finds that no variance is needed to afford relief since there is space to otherwise place those structures on the Property in compliance with the Sussex County Zoning Code.
 - d. The Board found that the Applicants could mitigate or alleviate in total the need for the variances if the pool and shed were located farther away from the property line along Arrow Drive but the Applicants wanted to maintain the area where they split wood and receives firewood deliveries.
 - e. The Board further found that the shed could be located closer to the middle of the Property thereby removing any need for a variance but the Applicants were unwilling to move the shed.
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 variance for the fence height met the standards for granting a variance. The findings below further support the Board's decision to approve the Application for the fence height variance.
- a. The Property is unique as it is a lot adjacent to 2 roads and wetlands. In fact, a portion of the lot consists of wetlands so development is pushed to the south side of the lot. Accordingly, the Applicants propose to place a fence along Arrow Drive near a pool. While the Board finds that the pool can be constructed in compliance with the Code, the fence would likely have to be constructed within the front yard of the Property. This results in the fence having a fence height limitation of 3.5 feet but the fence height requirement for a pool is taller than 3.5 feet. These conditions have created an unnecessary hardship and exceptional practical difficulty for the

Applicants who seek to construct a fence on the Property but cannot do so in compliance with the Sussex County Zoning Code.

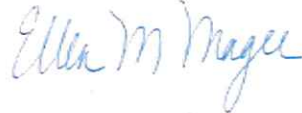
- b. The unnecessary hardship and exceptional practical difficulty related to the fence are not being created by the provisions of the Sussex County Zoning Code.
- c. Due to the uniqueness of the Property, the Property cannot be developed with the fence in strict conformity with the Sussex County Zoning Code. The Applicants propose to construct a fence but are unable to do so without violating the fence height requirements. The fence is needed for a pool to be constructed on the Property. The variance for the fence is thus necessary to enable reasonable use of the Property. The Board is convinced that the shape and location of the fence are also reasonable (which is confirmed when reviewing the survey).
- d. The unnecessary hardship and exceptional practical difficulty were not created by the Applicants. The Applicants did not create the wetlands issues on the north side of the Property which drive development closer to Arrow Drive. The unique conditions of the Property have created an unnecessary hardship and exceptional practical difficulty for the Applicants who seek to construct the proposed fence.
- e. The variance for the fence 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 fence will not have a negative impact on the neighborhood. The adjacent roads are dead-end roads which and the fence should not impact motorists. There is a grove of trees nearby which further buffer the view of the Property. Neighbors indicated support of the request. No evidence was presented which convinced the Board that the fence would somehow alter the essential character of the neighborhood or be detrimental to the public welfare.
- f. The variance sought for the fence is the minimum variance necessary to afford relief and the variance requested represents the least modification possible of the regulation at issue. The Applicants have demonstrated that the variance sought for the fence will allow the Applicants to construct a privacy fence near its proposed pool. The fence will provide adequate privacy and meet the pool fence height requirements.
- g. The condition or situation of the Property and the intended use of the Property is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the Sussex County Zoning Code.

The Board granted the variance application for the fence height finding that it met the standards for granting a variance but denied the variance application for the pool and shed finding that it failed to meet the standards for granting a variance.

Decision of the Board

Upon motion duly made and seconded, the variance application was denied in part and approved in part. The Board Members in favor of the motion to approve in part and deny in part were Dr. Kevin Carson, Mr. John Williamson, Mr. Brent Workman and Ms. Ellen Magee. No Board Member voted against the motion to approve the variance application in part and to deny the variance application in part. Mr. Jeffrey Chorman abstained from voting on this application.

BOARD OF ADJUSTMENT
OF SUSSEX COUNTY



Ellen M. Magee
Chair

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

Date February 4, 2020