

BEFORE THE BOARD OF ADJUSTMENT OF SUSSEX COUNTY

IN RE: JESSICA F. PEAKE

(Case No. 12506)

A public hearing was held after due notice on December 21, 2020. The Board members present were: Dr. Kevin Carson, Mr. Jeff Chorman, Ms. Ellen Magee, and Mr. John Williamson.

Nature of the Proceedings

This is an application for variances from the front yard and rear yard setback requirements for proposed structures.

Findings of Fact

The Board found that the Applicant is requesting a variance of 40 feet from the sixty (60) feet front yard setback requirement and a variance of 5 feet from the five (5) feet rear yard setback requirement for a proposed mini-golf course. This application pertains to certain real located on the east side of Coastal Highway (Route 1) approximately 300 feet south of Jefferson Bridge Road (911 Address: 32967 Coastal Highway, Bethany Beach); said property being identified as Sussex County Tax Map Parcel Number 1-34-17.11-40.00. After a public hearing, the Board made the following findings of fact:

1. The Board was given copies of the Application, an aerial photograph of the Property, a letter from Mackenzie Peet, a landscape plan, deed and property information, variance and conditional use history, a service level evaluation from DelDOT, photographs, a lease, a site plan of the Property from McCrone Engineering, and a portion of the tax map of the area.
2. The Board also recognizes that the Property is the same property which was the subject of Case No. 12416 which was a variance request that was denied by the Board. Since this property was the subject of a prior denial by the Board, the Applicant must demonstrate that there has been a substantial change in the circumstances or conditions affecting the Property or in the proposed use or plans for the use.
3. The Board found that the Office of Planning & Zoning received no letters in support of or in opposition the Application.
4. The Board found that Nick Geracimos, Dean Geracimos, Jack Burbage, and Kathy Pioreschi were sworn in to give testimony about the Application. The Applicant was represented by Mackenzie Peet, Esquire, who presented the Application.
5. The Board found that Ms. Peet stated that the Applicant believes there has been a substantial change in the circumstances or conditions affecting the Property or in the proposed use or plans for the use from the prior variance application.
6. The Board found that Ms. Peet stated that the Property is located on the east side of Coastal Highway (Rt. 1) and is the former location of Beach Liquors which has since moved across the highway. The Property consists of 0.46 acres and is zoned General Commercial (C-1). According to Ms. Peet, the properties to the north and east of this property are also zoned C-1 and there are HR-1 and MR zoned properties nearby as well.
7. The Board found that Ms. Peet stated that the Applicant's prior variance application (Case No. 12416) included a variance request of 45 feet from the 60 feet front yard setback requirement, a variance of 5 feet from the 20 feet landscape buffer of the combined highway corridor overlay zone, and a variance of 119 parking spaces from

the 120 required onsite parking spaces. The Board denied all three variance requests.

8. The Board found that Ms. Peet stated that, in addition to the variance request, the Applicant applied for and received a conditional use approval from Sussex County Council on June 9, 2020, to operate a miniature golf course on the Property and that County Council found that the said use is in accordance with the Comprehensive Development Plan and promoted the health, safety, morals, convenience, order, prosperity and welfare of the present and future inhabitants of Sussex County. The conditional use approval was subject to certain conditions which Ms. Peet outlined for the Board. Copies of those conditions were included in the record.
9. The Board found that Ms. Peet stated that the Board of Adjustment is a quasi-judicial body subject to the principle of *res judicata* which means a matter that has been adjudicated and decided then you cannot sue again to get a different result. Ms. Peet argued, however, that the Superior Court determined in Kollock vs. Sussex County Board of Adjustment, "while a Board cannot change its decision once made, it can consider a new application for similar relief if there has been a substantial change in the circumstances or the conditions affecting the property or in the proposed use or plans for use" and that the Board could grant a second application which had a substantial change from the original application.
10. The Board found that Ms. Peet stated that it is the Applicant's position that there is a material change affecting the merits of this Application and she argued that the following points support a consideration of the Applicant's new variance application:
 - a. A conditional use of land was granted for the property by Ordinance 2713 specifically addressing parking concerns addressed by this Board and that conditional use permits parking on-site and on the adjacent property and therefore, eliminates the need for a variance from the parking requirement.
 - b. The location of parking has changed to provide a more sensible and safe location that will buffer the course from the highway.
 - c. A conditional use of land was granted for the Property previously addressing the Board's safety concerns requiring the installation of a fence between the golf course and Route 1.
 - d. There is a guard rail proposed to address the safety concerns expressed by the Board.
 - e. There is no longer a need to request a variance from the buffer requirement for the overlay zone.
 - f. The entire structure has been set back farther from Route 1 to address safety concerns.
 - g. The front yard variance request has been reduced to 40 feet and not the original 55 feet and 45 feet requests.
 - h. There is now a rear yard variance request
11. The Board found that Ms. Peet stated that Nick's Mini Golf is a family-owned business that has been in existence since 2015 and operates six miniature golf course locations in the Delmarva region with approximately 30 employees.
12. The Board found that Ms. Peet stated that Nick's Mini Golf will embrace the family atmosphere in Bethany Beach and will enhance the existing commercial use and provide for commercial growth and jobs in Bethany Beach.
13. The Board found that Ms. Peet stated that Mr. Burbage owns the adjacent lot and is agreeable to the structure being up to the property line.
14. The Board found that Ms. Peet stated that the proposed course will be 20 feet off the front property line to address safety concerns previously raised by the Board.
15. The Board found that Ms. Peet stated that parking will be in the front yard and the entrance will be same location as it currently exists.

16. The Board found that Ms. Peet stated that there will be a guardrail and a 42 inch tall fence to keep balls off the highway.
17. The Board found that Ms. Peet stated that there is significant bicycle parking in the area as well.
18. The Board found that Ms. Peet stated that the existing building does not conform to the current Sussex County Zoning Code and that any proposed structure at this site would require a variance because the setback requirements render 50% of the building envelope unusable.
19. The Board found that Ms. Peet stated that that no traffic impact study was required by DelDOT.
20. The Board found that Ms. Peet stated that the Property is unique and irregularly shaped as the lot is narrow and shallow to the south and wider to the north which precludes the development of an 18-hole miniature golf course without the granting of the variances.
21. The Board found that Ms. Peet stated that the lot's uniqueness and irregularity existed prior to the Applicant's lease of the site and that, due to the uniqueness of the Property, the Property cannot be developed in strict conformity with the Zoning Code.
22. The Board found that Ms. Peet stated that the exceptional practical difficulty was not created by the Applicant and that the variances will not alter the essential character of the neighborhood.
23. The Board found that Ms. Peet stated that the Property is zoned C-1 and surrounded by C-1 parcels with the exception of one adjacent lot zoned MR.
24. The Board found that Ms. Peet stated that the use will provide recreation for residents and tourists of Bethany Beach.
25. The Board found that Ms. Peet stated that the vegetative areas will remain where feasible during and post construction and a landscape plan will be prepared.
26. The Board found that Ms. Peet stated that the requested variances represent the minimum variances that will afford relief and represent the least modifications possible.
27. The Board found that Mr. Nick Geracimos, who is the founder of Nick's Mini Golf, affirmed the statements made by Ms. Peet as true and correct.
28. The Board found that Nick Geracimos testified that he has spent a lot of time, resources and energy to bring an forward an Application that he believes is substantially changed from the previous application. He also testified that safety concerns have been addressed.
29. The Board found that Nick Geracimos testified that this is a business that will complement surrounding businesses.
30. The Board found that Nick Geracimos testified that there will be off-site parking and a path to the sales center for the golf course.
31. The Board found that Nick Geracimos testified that there will be a retaining wall around the entire course and the maintenance can be performed without entering the adjoining property.
32. The Board found that Mr. Burbage testified that he spoke to the owners of Mickey's Crab House and they have no objection to the Application. He believes the concerns raised by neighbors with the prior application have been addressed.
33. The Board found that Mr. Burbage testified that he is the owner of the property to the east and has no issue with the rear yard variance request.
34. The Board found that Mr. Burbage testified that there is a shared parking agreement for 11 spaces on his other lands.
35. The Board found that Dean Geracimos testified that he hands the public relations for the business and that there is excitement in the area for the proposed golf course, particularly with the restaurants because there is a need in the area for this type of business.

36. The Board found that Ms. Pioreschi testified that her mother, Jessica Peake, owns the Property and the Property has been in the family's name since the 1970s. Her family is happy that this will be a community-oriented business and she requests the Board's approval of the requests.
37. The Board found that one person appeared in support of and no one appeared in opposition to the Application.
38. 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 there has been a substantial change of conditions or other conditions or in the proposed use or plans for use which materially affect the merits of the request.
- a. The Board previously denied a variance of 45 feet from the 60 feet front yard setback requirement, a variance of 5 feet from the 20 feet landscape buffer requirement, and a variance of 119 parking spaces from the required 125 parking space requirement for a proposed golf course. See the Board's decision in Case No. 12416.
 - b. Since that decision was rendered, the Applicant has received a conditional use approval from Sussex County Council which has addressed the parking issue. See Conditional Use Approval No. CU 2222. A variance from the parking space requirement is no longer needed. The conditional use approval also addressed the Board's prior concerns about the installation of a fence between the golf course and Coastal Highway. A guardrail is proposed by the Applicant and is a required condition of the conditional use approval.
 - c. The Applicant has changed the location of the parking area to buffer portions of the course from Coastal Highway.
 - d. The Applicant has revised its plan so that there is no longer a variance needed from the landscape buffer requirement.
 - e. The Applicant has revised its plan so that the golf course will be set back farther from Coastal Highway. As such, the front yard variance requested is substantially different from the prior front yard variance request. While the Applicant now proposes a rear yard variance, it is clear that the plans proposed by the Applicant are substantially different from the original application.
 - f. These findings confirm that there has been a substantial change in conditions affecting the property and that there has been a substantial change in the proposed use or plans for the use.
39. 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 met the standards for granting a variance. The findings below further support the Board's decision to approve the Application.
- a. The Property is unique in size, shape, and condition. The lot is a small lot with significant frontage along Route 1 but the lot is not deep. In fact, the rear yard and front yard property lines come to a point on the south side of the lot. Consequently, these conditions have created a small and unusually shaped building envelope where it is more desirable to build the lot closer to the rear yard than the front yard. The desirability to build towards the rear yard is particularly important because the Applicant seeks to keep patrons away from Coastal Highway, which is adjacent to the front yard property line. These unique characteristics of this Property limit the buildable area available to the Applicant and have created an exceptional practical difficulty and unnecessary hardship for the Applicant who seeks to construct a miniature golf course on the lot.

- b. The unnecessary hardship and exceptional practical difficulty are not being created by the provisions of the Sussex County Zoning Code.
- c. Due to the uniqueness of the lot, the Property cannot be developed in strict conformity with the Sussex County Zoning Code. The Property has a unique size, shape, and condition and the buildable area thereof is limited due to these conditions. The Applicant seeks to construct a miniature golf course on the lot but is unable to do so without violating the Sussex County Zoning Code. The Board is convinced that the variances are necessary to enable the reasonable use of the Property as the variances will allow a reasonably sized miniature golf course to be constructed on the lot. The survey and photographs clearly demonstrate the challenges with building on the lot. The Board is also convinced that the Applicant took measures to address the Board's prior concerns and that this application demonstrates that the Applicant is unable to reasonably use the Property without a variance. The Board notes that the substantial change in the plans from the prior application demonstrate how the conditions of the Property have limited the Applicant's development thereof.
- d. The exceptional practical difficulty and unnecessary hardship were not created by the Applicant. The Applicant did not create the unusual conditions of the Property. The lot was created many years ago and the Nick's Mini Golf only recently entered into a lease for the lot. The preexisting conditions have resulted in a limited building envelope on the Property and the small building envelope has created the exceptional practical difficulty. The unique characteristics of the Property are clear when reviewing the survey. The Board is convinced that the exceptional practical difficulty was not created by the Applicant but was created by the lot's unique characteristics. The new application demonstrates that the Applicant simply could not develop the Property without a variance due to the unique conditions of the Property and those conditions have created an exceptional practical difficulty and an unnecessary hardship.
- e. 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 variances will have no effect on the character of the neighborhood. The variances will allow the Applicant to develop the Property with a miniature golf course which should complement neighboring businesses and residences. The Board previously expressed concerns about the effect of the miniature golf course on parking in the area but the Applicant has since obtained a conditional use approval to allow for reduced parking and the Applicant has entered into an off-site parking agreement with its neighbor. That neighbor is also adjacent to the rear of the Property and has no objection to the request, which is notable since the rear yard variance request will be adjacent to the neighbor's lot. The Board notes that, while there was opposition to the prior application, no such opposition was made to this new application. There was no evidence that the variances would alter the essential character of the neighborhood or be detrimental to the public welfare.
- f. The variances sought 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 construct a reasonably sized miniature golf course on the Property. The Board is convinced that the Applicant took measures to limit the encroachments. The Applicant has redesigned its original application by rearranging the parking, eliminating the need for a

variance from the landscape buffer requirement, and reducing the need for a front yard variance thereby moving the miniature golf course away from Coastal Highway. The unique conditions of the Property greatly limited the Applicant's ability to otherwise develop the site in compliance with the Code but the Applicant has tried to minimize the encroachments.

- 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 finding that it met the standards for granting a variance.

Decision of the Board

Upon motion duly made and seconded, the Board found that a substantial change in the circumstances or conditions affecting the property or in the proposed use or plans for use has been shown by the Applicant and that the Applicant could proceed with its variance application. The Board Members in favor of the motion were Dr. Kevin Carson, Mr. Jeffrey Chorman, Ms. Ellen Magee, and Mr. John Williamson. No Board Member voted against the motion. Mr. Brent Workman did not participate in the discussion or vote on this application.

Upon motion duly made and seconded, the variance application was approved. The Board Members in favor were Dr. Kevin Carson, Mr. Jeffrey Chorman, and Ms. Ellen Magee. Mr. John Williamson voted against the motion to approve Application. Mr. Brent Workman did not participate in the discussion or vote on this application.

BOARD OF ADJUSTMENT
OF SUSSEX COUNTY



John Williamson
Chairman

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

Date March 1, 2021