

BEFORE THE BOARD OF ADJUSTMENT OF SUSSEX COUNTY

IN RE: SCOTT E. KAMMERER & ELISABETH H. KAMMERER

(Case No. 12507)

A 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 maximum fence height requirement for an existing fence.

Findings of Fact

The Board found that the Applicants are requesting a variance of 1 foot 2 inches from the seven (7) feet maximum height requirement for an existing fence. The Property is located on the northeast side of Fisher Street within the Silver Lake Manor Subdivision (911 Address: 20591 Fisher Street, Rehoboth Beach) said property being identified as Sussex County Tax Map Parcel Number: 3-34-20.09-41.00. After a public hearing, the Board made the following findings of fact:

1. The Board was given copies of the Application, property information, a deed to the Property, permit information, a portion of the Sussex County Zoning Code, a survey dated October 20, 2020, building permit information, letters in support and in opposition to the Application, photographs, an aerial photograph of the Property, and a portion of the tax map of the area.
2. The Board found that the Office of Planning & Zoning received four letters in support of the Application and one letter in opposition to the Application.
3. The Board found that Scott Kammerer and Elisabeth Kammerer were sworn in to give testimony about the Application. Mackenzie Peet, Esquire, appeared on behalf of the Applicants.
4. The Board found that Ms. Peet stated that the subject property is in the Silver Lake Manor subdivision in the MR zoning district and consists of approximately 5,000 square feet.
5. The Board found that Ms. Peet stated that the structures on this lot meet the setback requirements but the Applicants need a variance for their existing fence that surrounds their new pool, which was recently installed with 37 feet of fencing around the swimming pool for privacy.
6. The Board found that Ms. Peet stated that the Property is narrow and appears to have been subdivided from a larger parcel.
7. The Board found that Ms. Peet stated that the portion of the fence that is non-compliant with County Code is an L-shaped portion of the fence consisting of approximately five panels of fencing located on top of a retaining wall and the portions of the fence which exceed the fence height cannot be reduced. She noted that the survey indicates more panels may be at issue.
8. The Board found that Ms. Peet stated that the Property is unique as it is a narrow lot measuring 50 feet wide.
9. The Board found that Ms. Peet stated that the exceptional practical difficulty was not created by the Applicants but by the fence contractor.
10. The Board found that Ms. Peet stated that the fence was permitted and compliant with County Code with the exception of the five panels that are above the permitted height.

11. The Board found that Ms. Peet stated that the variance will not alter the essential character of the neighborhood.
12. The Board found that Ms. Peet stated that the variance requested is the minimum variance request to allow the fence to remain in its current location.
13. The Board found that Mr. and Ms. Kammerer affirmed the statements made by Ms. Peet as true and correct.
14. The Board found that Ms. Kammerer testified that the Applicants worked with a contractor and his subcontractor and there were no changes made to the building plans following the issuance of the permit.
15. The Board found that Mr. Kammerer testified that, when you are on his property, the fence is 6 feet tall but when you go on the other side it is 8 feet tall because of the retaining wall.
16. The Board found that Ms. Peet stated that the neighboring property is lower so the fence appears taller on that side.
17. The Board found that Ms. Peet stated that the front yard of the Property is level with neighboring lands but the neighboring land slopes to the rear.
18. The Board found that Ms. Irene Zarechnak was sworn in to give testimony in opposition to the Application.
19. The Board found that Ms. Zarechnak testified that the rear of the Kammerer lot is her side property line. She questions why the pool was raised and she argued that the fence blocks the natural sunlight to the perennial garden on her property.
20. The Board found that Ms. Peet stated that the Applicants relied on their builders.
21. The Board found that Ms. Kammerer testified that the Applicants had to get new builders and that the wall is poured.
22. The Board found that Mr. Kammerer testified that the fence is 6 feet tall all around the pool and that the retaining wall is around the pool as well.
23. The Board found that Ms. Peet stated that the area that is an issue is where the yard slopes.
24. The Board found that no one appeared in support of and two people appeared in opposition to the Application.
25. 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 due to its unique size and neighborhood topography. The Property is a small and narrow lot consisting of only 5,007 square feet and is approximately 50 feet wide. The Property is improved by a pool, retaining wall, and privacy fence. The Property has a different elevation in the rear yard from neighboring properties and the fence was built on top of the retaining wall. On portions where the Property is level with its neighbors, the fence complies with the fence height requirements. On portions of the Property where the Property is not level with its neighbors, the fence does not comply with the fence height requirements. Per the Applicants' testimony, however, when looking at the fence from the Property, the fence meets the fence height requirements. The Board is convinced that the different elevations have created a unique condition and the unique condition has created an exceptional practical difficulty and unnecessary hardship for the Applicants who seek to retain a fence 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 elevation in comparison with neighboring lots and the fence is

located on top of a retaining wall. The Applicants seek to retain a fence of reasonable size but are unable to do so without violating the Sussex County Zoning Code. The Board is convinced that the variance is necessary to enable the reasonable use of the Property as the variance will allow the Applicants to retain the fence. The Board is convinced that the shape and location of the fence are also reasonable, which is confirmed when reviewing the survey provided by the Applicants. The Board notes that the fence provides the Applicants with reasonable privacy for their pool.

- d. The exceptional practical difficulty and unnecessary hardship were not created by the Applicants. The Applicants did not create the unusual size or elevation of the Property. The unique elevation of the Property as compared to its neighbors has resulted in an uneven rear yard. The Applicants retained a builder to construct the retaining wall and fence in compliance with the Code only to later learn that a portion of the fence does not comply with the Code. The unique elevation of the Property, however, has created the exceptional practical difficulty and unnecessary hardship. The Board is convinced that the exceptional practical difficulty and unnecessary hardship were not created by the Applicants but was created the lot's unique characteristics and by the builder error.
- e. The variance 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 have no effect on the character of the neighborhood. The fence is only 6 feet tall when on the Applicants' lot and only a small portion of the fence exceeds the fence height limitation as viewed from neighboring properties. The Board notes that there are letters from neighbors supporting the Application; though there was testimony and correspondence in opposition to the Application. One letter in opposition focused on noise from the pool but the pool does not need a variance. If anything, the fence should provide an enhance barrier from the pool. The structures are consistent with residential use and the Board was not convinced by substantial evidence that the variance would somehow alter the essential character of the neighborhood or be detrimental to the public welfare.
- f. The variance sought 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 will allow the Applicants to retain a fence on the Property. No additions or modifications to the fence are proposed. The fence will provide privacy for the pool.
- 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 variance application was approved. The Board Members in favor of the motion to approve were Dr. Kevin Carson, Mr. Jeffrey Chorman, Ms. Ellen Magee, and Mr. John Williamson. No Board Member voted against the Motion to approve the variance 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.