

**BEFORE THE BOARD OF ADJUSTMENT OF SUSSEX COUNTY
IN RE: SHELDON BERGER**

(Case No. 12513)

A hearing was held after due notice on January 4, 2021. The Board members present were: Dr. Kevin Carson, Mr. Jeff Chorman, and Mr. John Williamson.

Nature of the Proceedings

This is an application for variances from the front yard setback, side yard setback, and maximum fence height requirements for proposed and existing structures.

Findings of Fact

The Board found that the Applicant is requesting the following variances: 1) a variance of 13.6 feet from the forty (40) feet front yard setback requirement from Oak Orchard Road for an existing shed; 2) a variance of 22 feet from the forty (40) feet front yard setback requirement from Oak Orchard Road for a proposed pool; 3) a variance of 16 feet from the forty (40) feet front yard setback requirement from Oak Orchard Road for a proposed deck; 4) a variance of 20 feet from the forty (40) feet front yard setback requirement from Oak Orchard Road for proposed steps on a proposed deck; 5) a variance of 2.5 feet from the 3.5 foot maximum fence height requirement for a fence in a front yard setback; 6) a variance of 6.6 feet from the thirty (30) feet front yard setback requirement from Oak Meadow Drive for an existing porch; 7) a variance of 11.6 feet from the thirty (30) feet front yard setback requirement from Oak Meadow Drive for an existing set of steps; and 8) a variance of 3.9 feet from the ten (10) feet side yard setback requirement on the northwest side for an existing HVAC system. This application pertains to certain real property that is a through lot located on the northeast side of Oak Meadow Drive and the southwest side of Oak Orchard Road within the Oak Meadows Subdivision (911 Address: 27772 Oak Meadow Drive, Millsboro); said property being identified as Sussex County Tax Map Parcel Number 2-34-29.00-117.00. After a public hearing, the Board made the following findings of fact:

1. The Board was given copies of the Application, a survey of the property dated December 15, 2020, photographs, a survey of the Property dated October 26, 2020, correspondence in support of the Application, 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 two letters in support of and no correspondence in opposition to the Application.
3. The Board found that Sheldon Berger was sworn in to give testimony about the Application.
4. The Board found that Mr. Berger testified that he wishes to make some changes to his property which will include an addition, pool, and deck. The addition will meet the setback requirements but the pool, deck, and steps will require variances from the front yard setback requirement off Oak Orchard Road.
5. The Board found that Mr. Berger testified that he is not the original owner of this property and that the prior owner built the existing house and shed in the early 1990s. Mr. Berger stated that he has made no improvements to the Property since purchasing the home.
6. The Board found that Mr. Berger testified that his neighbors have a fence measuring 6 feet tall and he would like to extend that fence along his property line adjacent to Route 5.
7. The Board found that Mr. Berger testified that the Property is adjacent to Route 5 which is a heavily traveled and noisy road and that the fence is needed to provide a sound barrier from the road as well as to keep his dog on his property.

8. The Board found that Mr. Berger testified that the fence height variance is also needed because the County Code regulations require that a fence at least 4 feet tall surround the pool.
9. The Board found that Mr. Berger testified that he chose a narrower, oval-shaped pool to minimize the encroachments into the setback area.
10. The Board found that Mr. Berger testified that there will be a deck adjacent to the pool.
11. The Board found that Mr. Berger testified that the lot is unique as it is a through lot with two front yard setbacks and the double setbacks make it exceptionally difficult to enclose the rear yard for a dog and pool.
12. The Board found that Mr. Berger testified that the variances are necessary to enable the reasonable use of the Property.
13. The Board found that Mr. Berger testified that he has lived on the property for one year and he cannot enjoy the property without a fence due to the noise from Route 5.
14. The Board found that Mr. Berger testified that the exceptional practical difficulty was created by the unique lot with two front yard setbacks.
15. The Board found that Mr. Berger testified that granting the variances will not alter the essential character of the neighborhood as the neighbors at four homes on Oak Meadow have 6 foot tall fences and multiple adjacent properties have fences on the side yards higher than 3.5 feet tall.
16. The Board found that Mr. Berger testified that the setback for a pool on a regular lot is 10 feet and his pool will be 18 feet from the property line.
17. The Board found that Mr. Berger testified that the deck adjacent to the pool will be even with the first floor of the house.
18. The Board found that Mr. Berger testified that the Application has received support from neighbors to the east and west of the lot.
19. The Board found that Mr. Berger testified that the fence will also allow him to keep his dog on the property.
20. The Board found that Mr. Berger testified that the variances are the minimum to afford relief.
21. The Board found that Mr. Berger testified that there is approximately 7 feet between the property line and the edge of paving of Oak Orchard Road and that he has no vehicular access to Route 5.
22. The Board found that Mr. Berger testified that the Property is not located at an intersection and that granting the variance for the fence height will not cause any visibility issues for traffic.
23. The Board found that one person appeared in support of and no one appeared in opposition to the Application.
24. Based on the findings above and the testimony and evidence presented at the public hearing and the public record, which the Board found credible, persuasive, and un rebutted, 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 as it is a lot with road frontages on two roads and is subject to two front yard setback requirements even though the Property only has vehicular access from Oak Meadow Drive. The portion of the Property along Oak Orchard Road is effectively the rear yard of the lot but is subject to front yard setback requirements. These conditions greatly restrict the building envelope on the Property. While the Property is considered a through lot, the Applicant does not have direct access to Oak Orchard Road and only access the Property from Oak Meadow Drive. The noise from Route 5 also poses challenge to the Applicant's reasonable use of the lot. It is clear to the Board that the lot's unique characteristics have

- created an unnecessary hardship and exceptional practical difficulty for the Applicant who seeks to retain a reasonably sized shed, porch, HVAC, and steps and to erect a fence, deck, pool, and steps 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 is bordered on two sides by roads and has unique setback requirements even though the Applicant can only access the Property from one of those roads. The Applicant seeks to retain a reasonably sized shed, porch, HVAC, and steps and to erect a fence, deck, pool, and steps on the Property 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 the Applicant to retain a reasonably sized shed, porch, HVAC, and steps and to erect a fence, deck, pool, and steps on the Property. The Board is convinced that the shape and location of these structures are also reasonable, which is confirmed when reviewing the survey provided by the Applicant. The Board also notes that the fence height variance is needed to provide a noise barrier from the well-traveled Oak Orchard Road and to provide safety for the Applicant's dog and privacy for the pool.
 - d. The exceptional practical difficulty and unnecessary hardship was not created by the Applicant. The Applicant did not create the lot or enact the setback requirements which have limited the building envelope of the lot. The unique characteristics of the Property are clear when reviewing the survey. The Applicant also did not place the house, porch, steps, shed, and HVAC system on the lot. Those structures were placed on the lot by a prior owner years ago. The Board is convinced that the unnecessary exceptional practical difficulty was not created by the Applicant but was created the lot's unique characteristics. The Board also notes that Oak Orchard Road is a busy road and the traffic and noise along that road have created the need for the fence to provide privacy and buffering from the traffic and noise.
 - 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 structures will have no effect on the character of the neighborhood. The porch, steps, HVAC system, and shed have been on the Property for many years and no complaints about those structures were noted in the record. There are other similar fences in the community as well. The proposed structures do not present visibility concerns along Oak Orchard Road and the fence will help restrict the Applicant's dog from running onto Oak Orchard Road; which should benefit travelers along that road. Furthermore, no evidence was presented which would indicate that the variances would somehow alter the essential character of the neighborhood or be detrimental to the public welfare. Rather, the Board received letters of support. The Board also notes that there is a gap between the edge of paving of Oak Orchard Road and the property line so the property appears larger than it actually is.
 - 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 retain a reasonably sized shed, porch, HVAC, and steps and to erect a fence, deck, pool, and steps on the lot. The fence will be the same height as nearby fences. The Board also notes that

the Applicant designed the pool with a narrow shape to minimize the encroachment into the setback area. The deck and steps do not protrude farther than the pool. There are no additions or modifications to the existing encroaching structures which have been on the lot for many years.

- 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, 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