

BEFORE THE BOARD OF ADJUSTMENT OF SUSSEX COUNTY

IN RE: LISA NICOLETTI & JOHN SMILYK

(Case No. 12556)

A hearing was held after due notice on May 3, 2021. The Board members present were: Dr. Kevin Carson, Mr. Jeff Chorman, Mr. John T. Hastings, Mr. John Williamson, and Mr. Brent Workman.

Nature of the Proceedings

This is an application for variance from the maximum fence height requirement for a proposed fence.

Findings of Fact

The Board found that the Applicants are requesting a variance of 0.5 feet from the 3.5 foot maximum fence height requirement for a proposed fence in the front yard setback. The property is located on the north side of Willow Creek Road within the Willow Creek Subdivision (911 Address: 16086 Willow Creek Road, Lewes) said property being identified as Sussex County Tax Map Parcel Number: 2-35-23.00-4.12. 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 March 16, 2021, photographs, a grade plan of the Property, a fence and pool layout plan dated March 16, 2021, 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 no correspondence in support of or in opposition to the Application.
3. The Board found that Lisa Nicoletti and John Smilyk were sworn in to give testimony about the Application.
4. The Board found that Ms. Nicoletti testified that the Applicants have applied for and received a permit for a swimming pool and that, to comply with the zoning requirements for the pool, they must install a 4 foot tall fence, but the code only allows a 3.5 ft. tall fence in the front yard setback.
5. The Board found that Ms. Nicoletti testified that the Property is unique as it has a very unusual topography, shape, and length. She noted that the parcel is extremely long, almost 2/10 of a mile and very shallow and that the lot undulates with very steep grade changes and starts at approximately 22 feet elevation and ends at a 2 feet elevation where it terminates into a farm pond.
6. The Board found that Ms. Nicoletti testified that, because of the unique conditions of the lot, it limits the areas that can be developed.
7. The Board found that Ms. Nicoletti testified that the home is sited perpendicular to the long, winding road frontage and there is no rear yard and a limited side yard and that the limited side yard occupies the usable area behind the home where the pool is proposed.
8. The Board found that Ms. Nicoletti testified that, in order to build the pool, the fence will run along the front portion of the lot.
9. The Board found that Ms. Nicoletti testified that the exceptional practical difficulty was not created by the Applicants.
10. The Board found that Ms. Nicoletti testified that the placement of the home was largely predetermined by the existing structures and use the Property prior to the Applicants' acquisition of the Property in 2018.

11. The Board found that Ms. Nicoletti testified that, due to the drastic changes in elevation, their engineer advised the Applicants to limit the areas of disturbance to preserve existing drainage patterns.
12. The Board found that Ms. Nicoletti testified that the Applicants left the existing accessory building, garage, walkway, septic system, and driveway in place.
13. The Board found that Ms. Nicoletti testified that the septic system takes up much of the area in front of the home.
14. The Board found that Ms. Nicoletti testified that the rear of the Property slopes greatly.
15. The Board found that Ms. Nicoletti testified that the variance will not alter the essential character of the neighborhood as it was home to a nursery for 35 years.
16. The Board found that Ms. Nicoletti testified that the front property border is already lined with mature trees and established evergreen hedges.
17. The Board found that Ms. Nicoletti testified that these will be supplemented with additional plantings to camouflage the fence.
18. The Board found that Ms. Nicoletti testified that the fence would be across the street from a high, densely wooded berm.
19. The Board found that Ms. Nicoletti testified that there are no homes facing the fence line.
20. The Board found that Ms. Nicoletti testified that a neighbor has a fence exceeding the height limit by approximately 1 foot.
21. The Board found that Ms. Nicoletti testified that the fence will not impact the view or aesthetics or impair the development of neighboring properties.
22. The Board found that Ms. Nicoletti testified that the request for 6 inches is the minimum to allow the Applicants to enclose the pool and yard for safety.
23. The Board found that Ms. Nicoletti testified that this portion of the fence is largely hidden due to the long bend in the road.
24. The Board found that Ms. Nicoletti testified that the area where the fence will be located could easily be perceived to be the rear of the yard.
25. The Board found that Ms. Nicoletti testified that a submitted letter outlines the medical necessity for a family member to have this pool and they are constructing the pool for their daughter.
26. The Board found that Ms. Nicoletti testified that most of the lots in the neighborhood measure 5-7 acres.
27. The Board found that Ms. Nicoletti testified that she has spoken with neighbors and they support the request.
28. The Board found that Ms. Nicoletti testified that there is approximately 15 feet from the property line to the edge of paving and that the fence will not create any visibility issues.
29. The Board found that Ms. Nicoletti testified that the Property is elevated approximately 5 to 10 feet above the road.
30. The Board found that Mr. Smilyk testified that, if you are driving by the Property, you would be looking at the berm and the fence will not be visible from the road.
31. The Board found that no one appeared in support of or in opposition to the Application.
32. 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 due it shape, development, and topography. The Applicants demonstrated that the topography of the lot has created a great difficulty in developing the lot. The lot is also quite shallow on the northeast side of the lot where the pool is proposed to be located. The septic system

servicing the existing house occupies much of the building envelope and there is little room where the pool could otherwise be located. It is quite clear to the Board that development of this lot is challenging even though the lot is fairly large. Due to the unique conditions of the lot, there appears no other location where the pool could be located and, since Code requires a fence measuring 4 feet tall, a variance would be needed to construct the pool. The Board finds that the unique conditions of the lot have created a limited building envelope and, thus, have created an exceptional practical difficulty and unnecessary hardship for the Applicants who seeks to install a pool and 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 Applicants need a taller fence than is permitted under the Code so that they can install a pool. While the pool will meet the setback requirements, the fence will not meet the height requirements and the Applicants are unable to build the necessary fence 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 construct a reasonably sized fence. The Board is convinced that the location of the fence is also reasonable, which is confirmed when reviewing the survey provided by the Applicants. The Board notes that the fence is only 6 inches taller than allowed under the Code and will be a significant distance from the actual pavement of Willow Creek Road.
- d. The exceptional practical difficulty and unnecessary hardship were not created by the Applicants. The Applicant did not create the lot conditions and those conditions have created the exceptional practical difficulty and unnecessary hardship. The unique characteristics of the Property are clear when reviewing the materials and testimony presented to the Board. 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.
- 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 will only be six inches taller than allowed by Code but the fence will be located off a bend in the road and is unlikely to be a distraction. The Applicants' testimony demonstrated that there is also a gap of 15 feet from the edge of paving of the road and the fence so the minimal height variance would likely be unnoticeable from the road. Vegetation also separates the fence from the road so its impact appears to be negligible. No substantial evidence was presented which convinced the Board 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 represent the least modification possible of the regulation at issue. The Applicants have demonstrated that the variance sought will allow the Applicants to construct the minimum fence needed to surround their pool. The Board is convinced that the Applicants explored other options for the location of the pool and, thus the fence, but were constrained by the lot's unique characteristics.

- 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, Mr. Travis Hastings, Mr. John Williamson, and Mr. Brent Workman. No Board Member voted against the Motion to approve the variance application.

BOARD OF ADJUSTMENT
OF SUSSEX COUNTY



John Williamson
Chair

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

Date July 12, 2021