

BEFORE THE BOARD OF ADJUSTMENT OF SUSSEX COUNTY

IN RE: FRANK TAYLOR & LAURA TAYLOR

(Case No. 12572)

A hearing was held after due notice on June 21, 2021. The Board members present were: Dr. Kevin Carson, Mr. Jeff Chorman, Mr. John T. Hastings, Mr. Jordan Warfel, and Mr. John Williamson.

Nature of the Proceedings

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

Findings of Fact

The Board found that the Applicants are requesting a variance of 1.5 feet from the maximum fence height requirement of 3.5 feet for an existing fence. This application pertains to certain real property located on the southeast side of Adams Avenue approximately 110 feet southwest of South Bay Shore Drive in Broadkill Beach (911 Address: 102 Adams Avenue, Milton); said property being identified as Sussex County Tax Map Parcel Number 2-35-4.17-6.00. 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, pictures, a building permit application, inspection notes, a drawing from Backyard Works, a survey dated October 3, 2019, 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 and two letters opposition to the Application.
3. The Board found that Laura Taylor was sworn in to testify about the Application.
4. The Board found that Ms. Taylor testified that she and her husband had a fence installed at 102 Adams Avenue by Backyard Works in February 2020, and that a permit was obtained by the contractor but she later received a notice of violation.
5. The Board found that Ms. Taylor testified that the house faces Bayshore Drive but is 80 feet from Bayshore Drive and that Adams Avenue provides access to the lot.
6. The Board found that Ms. Taylor testified that, when the fence company installed the fence, they considered Bay Shore Drive as being the front of the Property and thought that the fence was in compliance with side yard zoning requirements.
7. The Board found that Ms. Taylor testified that the back of the lot is unbuildable as it is on the marsh.
8. The Board found that Ms. Taylor testified that the fence is located at the end of Adams Avenue and is at the edge of the marsh.
9. The Board found that Ms. Taylor testified that there is a dock in the rear yard and that members of the public were crossing the subject property to access the water with canoes. She noted, however, that "no trespasser" signs are not on the Property.
10. The Board found that Ms. Taylor testified that the fence blocks the view of the marsh from the public and that prevents the public from entering the Property. She noted that she previously had a split-rail fence but it has been replaced with a taller fence.
11. The Board found that Ms. Taylor testified that the Property is unique because of the "L" shape.
12. The Board found that Ms. Taylor testified that a 3.5 foot tall fence could work but she believes a taller fence is a better deterrent.
13. The Board found that Ms. Taylor testified that she has only seen one trespasser since the fence was erected and that was a local worker.

14. The Board found that Ms. Taylor testified that neighbors have views of the marsh from their decks.
15. The Board found that Brenda Erdman and Alan Erdman were sworn in to give testimony in opposition to the Application. Ms. Erdman submitted exhibits to the Board to review.
16. The Board found that Ms. Erdman testified that her parents bought their lot in 1966 and 1971 and that she lives there from April to October.
17. The Board found that Ms. Erdman testified that the prior split-rail fence was able to be seen through but the new fence is solid white. She believes that the fence is an unsafe condition for her and her family as she cannot see behind the fence, which concerns her because she has a disabled daughter who is under 5 feet tall.
18. The Board found that Ms. Erdman testified that there is an alarm and light on the fence and that the alarm has gone off at 10:30 pm.
19. The Board found that Ms. Erdman testified that she lets her dogs out at night and cannot see where they go.
20. The Board found that Ms. Erdman testified that trespassing is not a constant thing but there have been approximately five people over the years who she has witnessed using the Applicant's dock.
21. The Board found that Ms. Erdman testified that she tells others not to use the dock.
22. The Board found that Mr. Erdman testified that the fence is also on the front of their property as the properties have a shared property line and that the fence runs perpendicular to his property line.
23. The Board found that Mr. Erdman testified that he has concerns for the safety of his wife when she is outdoors after dark as they cannot see behind the fence.
24. The Board found that Mr. Erdman testified that he believes the fence is a spite fence.
25. The Board found that Mr. Erdman testified that the gate to the fence swings open to the road. Ms. Taylor, however, disputed that claim and testified that the fence swings to the marsh.
26. The Board found that Mr. Erdman testified that a 3.5 foot tall fence with a no trespassing sign would suffice to keep trespassers off the Taylor property.
27. The Board found that Mr. Erdman testified that there are no similar fences in the neighborhood.
28. The Board found that Ms. Taylor testified that the neighbor's dogs have run onto her property.
29. The Board found that Ms. Taylor testified that the new fence is generally in the same location as the previous fence.
30. The Board found that one person appeared in support of and two persons appeared in opposition to the Application.
31. 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 failed to meet the standards for granting a variance. The findings below further support the Board's decision to deny the Application.
 - a. The Applicants failed to demonstrate that the Property was unique and that the uniqueness of the Property has created an exceptional practical difficulty. The Applicants complain of occasional trespassers due to the open nature of their prior, split-rail fence and, as a result of those issues, the Applicants installed a taller, solid fence. The fence is taller than is permitted under the Code. The Applicants, however, failed to demonstrate that there was some unique physical condition to the Property which necessitated the variance. The Applicants admitted that they did not install no trespassing signs to deter the trespassers. Moreover, the Applicants acknowledged that a fence built in compliance with the Code may work; though they would prefer a taller fence. The exceptional practical difficulty

appears to be due to the Applicants' wants rather than due to some unique physical condition of the Property.

- b. The Applicants failed to prove that the Property could not be developed in strict conformity with the Sussex County Zoning Code. As previously noted the Applicants admitted that a fence built in compliance could work and the Applicants have not taken steps to show that a smaller fence with no trespassing signs would not otherwise deter the trespassers. Rather, the Applicants went from having a largely open fence to a taller, solid fence with no signage without even attempting to see if a fence built in compliance with the Code would work. The Board finds that the Applicants failed to demonstrate that there was no other way to reasonably develop the lot without a variance or that the variance was necessary to reasonably use the Property. While the fence may be shorter than the Applicants seek, the Applicants can likely construct a fence on the site without a variance. The Board was simply not convinced that the Applicants could not otherwise develop the Property in compliance with the Code. For these reasons, the Board finds that the Property could be developed in strict conformity with the Code and that the variance is not necessary to enable reasonable use of the Property.
- c. The Board finds that the Applicants are creating their own exceptional practical difficulty by erecting a fence which does meet the County Code requirements. The Applicants' decision to construct this fence at this height is the reason for the need for a variance and has nothing to do with the size, shape, or condition of the Property. The Board was not convinced that there was some unusual condition to the Property which has created this difficulty. The building envelope appears to otherwise be able to fit a fence, albeit a shorter fence than the one preferred by the Applicants, without the need for the variance. The Board was not convinced that the variance request was the product of a *need*. Instead, the variance request appears to be the product of a *want* as the Applicants seek to build the fence as proposed for purposes of convenience, profit, and / or caprice. Since the Applicants can develop the Property in compliance with the Sussex County Zoning Code, the need for the variance 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.
- d. The Board finds that the Applicants failed to demonstrate that the variance would not alter the essential character of the neighborhood. The Applicants have constructed the fence near its neighbor's property line and at the terminus of Adams Avenue. The neighbors noted there are no other similar fences in the neighborhood. The Board has concerns that, if the fence remains at this height, others may seek to also build fences which do not comply with the Code. Given the nature of this area, tall fences out of compliance with the Code would likely alter the character of the neighborhood.
- e. Since the variance is not necessary to enable the reasonable use of the Property, the Board also finds that the variance requested is not the minimum variance necessary to afford relief. Furthermore, the Board finds that no variance is needed to afford relief since a shorter fence would afford the Applicants relief by providing a solid barrier from the dock to the road.

The Board denied the variance application 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. The Board Members in favor of the Motion to deny were Dr. Kevin Carson, Mr. Jeffrey Chorman, Mr. Travis Hastings, Mr. Jordan Warfel, and Mr. John Williamson. No Board Member voted against the Motion to deny 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 September 13, 2021