

BEFORE THE BOARD OF ADJUSTMENT OF SUSSEX COUNTY

IN RE: LOWELL F. SCOTT, JR.

(Case No. 12613)

A hearing was held after due notice on October 18, 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 side yard setback requirement for an existing structure.

Findings of Fact

The Board found that the Applicant is requesting a variance of 1.9 feet from the ten (10) feet side yard setback requirement on the northeast side for an existing swimming pool. This application pertains to certain real property located on the east side of Josephine Street within the Silver Lake Manor Subdivision (911 Address: 38398 Josephine Street, Rehoboth Beach); said property being identified as Sussex County Tax Map Parcel Number 3-34-20.09-137.00. 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 survey of the Property dated July 8, 2021, photographs, and a portion of the tax map of the area.
2. The Board found that the Office of Planning & Zoning received no letters in support of or in opposition to the Application.
3. The Board found that Dr. Lowell Scott was sworn in to testify about the Application and he submitted pictures to the Board to review.
4. The Board found that Dr. Scott testified that the original design for this property included a pool.
5. The Board found that Dr. Scott testified that the pool is rectangular but located in two triangular areas of the Property and the triangles meet at a point 27.1 feet away from the house.
6. The Board found that Dr. Scott testified that, when the pool was set up, the groundwater was too high.
7. The Board found that Dr. Scott testified that the pool was surrounded in concrete and kept away from the house for safety reasons but that he pushed the pool too close to the property line.
8. The Board found that Dr. Scott testified that, when he tried to put the pool in this triangular area, it became too close to the property line.
9. The Board found that Dr. Scott testified that wherever the pool would be placed in the rear yard would create the need for a variance.
10. The Board found that Dr. Scott testified that the patio is approximately 18 inches above ground level but the ground will be built up so that the patio will be lower than 6 inches. He intends to bring in fill dirt.
11. The Board found that Dr. Scott testified that the rear yard slopes but the patio is even. He noted that there are grade differences on the Property.
12. The Board found that Dr. Scott testified that the pool was permitted.
13. The Board found that Dr. Scott testified that there is a retaining wall in the corner and that there is no open access to the pool.
14. The Board found that Dr. Scott testified that the fence surrounds the yard with a gate by the garage.

15. The Board found that Dr. Scott testified that the pool was installed during the months of March and April and that he depended on his contractor, Pools and Spas Unlimited, to comply with code requirements.
16. The Board found that Dr. Scott testified that the Property is served by public water and sewer.
17. The Board found that Dr. Scott testified that there have been no complaints regarding the pool but a neighbor has flooding concerns.
18. The Board found that Dr. Scott testified that the dwelling was built by the Applicant and the original design of the pool was expected to comply with the Code but the pool size was extended by one foot for aesthetic reasons.
19. The Board found that Dr. Scott testified that attempts have been made to alleviate the flooding issue.
20. The Board found that Edward Gross was sworn in to give testimony in opposition to the Application. Mr. Gross submitted exhibits to Board members.
21. The Board found that Mr. Gross testified that he owns the adjacent property to Mr. Scott and has owned it for over 30 years.
22. The Board found that Mr. Gross testified that he opposes the variance request with sadness as he and the Applicant were friends.
23. The Board found that Mr. Gross testified that he winters in Florida but, when he returned, construction had begun on a pool that was larger than what he had been told.
24. The Board found that Mr. Gross testified that this pool has caused flooding on his property. He noted that he had a French drain installed and it was handling the flooding prior to the construction of the pool but the addition of the patio has increased the flooding.
25. The Board found that Mr. Gross testified that he believes the retaining wall will collapse as it is already moving.
26. The Board found that Mr. Gross testified that he allowed access to the subject property through his property and that he contacted the Applicant to ask if he was meeting setbacks and was assured that the pool was meeting the setbacks.
27. The Board found that Mr. Gross testified that there is a permit for an in-ground pool and a 1,000 square foot patio but that the completed patio is 32 inches high and consists of approximately 1,700 square feet.
28. The Board found that Mr. Gross testified that the elevated decking and pool has also created a noise nuisance. He noted that the Applicant has a large speaker system outside his house and that the Applicant holds lots of parties and used shuttle buses to his home.
29. The Board found that Mr. Gross testified that the use of the pool and patio affects the enjoyment of value of his property.
30. The Board found that Mr. Gross testified that he would have no issue if the Applicant complied with the Code.
31. The Board found that Mr. Gross testified that the Property is not unique and that the exceptional practical difficulty was created by the Applicant.
32. The Board found that Mr. Gross testified that a lot of water has come off the Property.
33. The Board found that Mr. Gross testified that he believes the patio does not comply with setbacks either.
34. The Board found that Dr. Scott testified that efforts have been made to alleviate the flooding and any water from the pool will be emitted to the subject property.
35. The Board found that Dr. Scott testified that there is a drain on the other side of the pool.
36. The Board found that Dr. Scott testified that the retaining wall was constructed with railroad ties with gravel and dirt underneath and that he is not aware of any issues with the retaining wall.

37. The Board found that Dr. Scott testified that, due to the retaining wall, no moisture should leave his lot.
38. The Board found that Dr. Scott testified that the northeast corner of the lot also floods.
39. The Board found that one person appeared in support of and one person appeared in opposition to the Application.
40. 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 Applicant failed to demonstrate that the Property was unique and that the uniqueness of the Property has created an exceptional practical difficulty. The lot is a small lot but the lot benefits from reduced setback requirements under the small lot ordinance. These provisions greatly enhance the size of the building envelope for the Property. The Applicant testified that he developed the Property with the existing house and that he always intended for the pool in the rear yard. Essentially, the Applicant had a "blank slate" upon which to design his new home and pool. Rather than design the pool in compliance with the Code, the Applicant has designed a pool that requires a variance into the side yard setback area. The Applicant noted that he even increased the size of the pool for aesthetic reasons. The Applicant has also created an elevated patio which does not meet the setback requirements. While this application does not pertain to the patio, the Board has concerns that the Applicant built the patio and pool without consideration as to whether the structures will need variances. The Applicant notes that he intends to put fill dirt in so that the patio will comply with the setback requirements but, as of the date of the hearing, that fill dirt had not yet been installed. Nevertheless, the Applicant did not convince the Board that the Property had some unique physical condition which would effectively limit his ability to develop the Property and which created an exceptional practical difficulty. Rather, the difficulty is clearly the result of the Applicant's intention to construct the pool within the setback area. The pool was enlarged from the original size for aesthetic reasons and appeared to have nothing to do with the conditions of the lot. The Applicant presented no evidence that a smaller pool would not work or that a pool was even necessary. Quite simply, there appears to be room to place a pool on the lot; albeit perhaps not of the Applicant's preferred size or in the Applicant's preferred location. As such, the Applicant has failed to demonstrate that there was some unique condition which has created the exceptional practical difficulty.
 - b. The Applicant failed to prove that the Property could not be developed in strict conformity with the Sussex County Zoning Code. The Property has buildable area to the rear of the house where a pool could likely be placed but the Applicant chose to extend the pool out beyond the setback area. As a result, a portion of the pool will be located outside the building envelope even though there is room on the lot to place a pool on the lot. Rather than comply with the Code, the Applicant proposes this variance to allow a pool that does not comply with the Code to remain in place. It is clear that the Applicant did not build the pool in strict conformity with the Code rather than developing the lot to comply with the Code's setback requirements. While the location of the pool in compliance with the Code may not be the location the Applicant prefers, the Applicant failed to demonstrate that he could not otherwise comply with the Code's setback requirements. The Applicant is not entitled to have a pool in this location. 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 Applicant is creating his own exceptional practical difficulty by constructing a pool which does not fit within the building envelope. The Applicant's decision to construct the pool in this location is the reason for the need for a variance and has nothing to do with the size, shape, or condition of the Property. There is no unusual condition to the Property which has created this difficulty. The building envelope appears to otherwise be able to fit a pool, albeit in a location which differs from the Applicant's preference, 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 Applicant seeks to retain the pool for purposes of convenience, profit, and / or caprice. Since the Applicant can develop the Property in compliance with the Sussex County Zoning Code, the need for the variance is something created by the Applicant's wants rather than an unusual physical condition relating to the Property. The Applicant has thus created his own exceptional practical difficulty.
- d. The Board finds that the Applicant failed to demonstrate that the variance will not alter the essential character of the neighborhood or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare. The Applicant testified that he experiences flooding problems on the northeast side of the Property yet he has constructed a pool and concrete patio on that side of the lot. He intends to also add fill dirt to raise the ground level of the lot. Meanwhile, his neighbor to the northeast testified to flooding problems prior to the installation of the pool and that those problems have been exacerbated since the pool's installation. Moreover, the Applicant constructed a large raised patio around the pool and uses that area for entertaining guests. The noise emanating from the pool and patio area; particularly close to the neighbor to the northeast have created disturbances which has also affected the neighbor's use of his own property.
- 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. The Applicant testified that he expanded the size of the pool for aesthetic reasons and he did not prove to the Board that a pool could not be installed in compliance with the Code. Furthermore, the Board finds that no variance is needed to afford relief since there is space to place a pool on the Property in compliance with the Sussex County Zoning Code.

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. Travis Hastings, and Mr. Jordan Warfel. Mr. Jeffrey Chorman and Mr. John Williamson 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 December 13, 2021.