

BEFORE THE BOARD OF ADJUSTMENT OF SUSSEX COUNTY

IN RE: JAMES C. DiPAULA, TTEE

(Case No. 12649)

A hearing was held after due notice on January 24, 2022. 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 variances from the front yard setback, side yard setback, and maximum fence height requirement requirements for proposed structures.

Findings of Fact

The Board found that the Applicant is requesting the following variances:

1. A variance of 13.9 feet from the thirty (30) feet front yard requirement for a proposed pool;
2. A variance of 0.5 feet from the 3.5 feet maximum height requirement for a fence in the front yard setback; and
3. A variance of 8 feet from the ten (10) feet side yard setback requirement on the south side for mechanical equipment.

This application pertains to certain real property located on the south side of Penn Street at the East Lake Drive and Penn Street intersection (911 Address: 2 Penn Street, Rehoboth Beach); said property being identified as Sussex County Tax Map Parcel Number 334-20.06-112.00 (hereinafter "the Property"). 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 letter from the Applicant's attorney dated September 24, 2021, a site plan of the Property dated December 15, 2021, pictures, a site plan of the Property dated June 8, 2021, correspondence in support of and in opposition to the Application, 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 one letter in opposition to the Application.
3. The Board found that James DiPaula and Meredith Beach were sworn in to give testimony about the Application. Fred Townsend, Esquire, appeared on behalf of the Applicant. Ms. Beach is the Applicant's landscape architect.
4. The Board found that Mr. Townsend stated that the Applicant is seeking a variance for a pool, fence, and mechanical equipment.
5. The Board found that Mr. Townsend stated that the Property is unique and presents unusual circumstances.
6. The Board found that Mr. Townsend stated that the Property is located at 2 Penn Street at the corner of East Lake Drive and is a corner lot which fronts on East Lake Drive. He noted that Penn Street is a right-of-way which runs all the way to the beach but is only partly paved.
7. The Board found that Mr. Townsend stated that there was a dwelling on the site which is no longer in existence. According to Mr. Townsend, the lot was previously part of a larger parcel that was subdivided and sold by a prior owner and that the prior owner removed the house. He noted that the Property was also previously improved by a pool that was removed in 2020 as well.

8. The Board found that Mr. Townsend stated that there is a dune setback along the ocean side which reduces the building envelope and has shifted the building envelope west towards Silver Lake Drive.
9. The Board found that Mr. Townsend stated that 64% of the lot is encumbered by setbacks including the dune setback and the corner setback from Penn Street.
10. The Board found that Mr. Townsend stated that the construction of the new dwelling is underway
11. The Board found that Mr. Townsend stated that the Applicant is seeking to locate a pool in an area where a pool was previously located and that the Applicant is unaware of any complaints about the location of the prior pool.
12. The Board found that Mr. Townsend stated that the Applicant is requesting to place a pool on the west side of the Property and that the pool will be no closer than 16.1 feet from the property line on East Lake Drive.
13. The Board found that Mr. Townsend stated that front yard setbacks restrict fence heights to 3.5 feet but the Sussex County Zoning Code also requires that pools have a 4 foot tall fence surrounding the pool for safety reasons.
14. The Board found that Mr. Townsend stated that the Applicant has the support of two of the neighbors for the variances and that the adjoining neighbor supports the fence and the pool but opposes the equipment in the side yard.
15. The Board found that Mr. Townsend stated that this build will include geothermal equipment so it will reduce the noise that would be caused by compressors.
16. The Board found that Mr. Townsend stated that a generator for emergencies will be placed in the side yard and it will turn on periodically for testing and that the pool equipment will also be placed in the side yard so that it is not occupying space in the yard.
17. The Board found that Mr. Townsend stated that the exceptional practical difficulty is created by the building envelope being pushed forward and towards the side.
18. The Board found that Mr. Townsend stated that the letter of objection from Dr. Sweeney stated that she had concerns about the HVAC but, as stated, the HVAC units will not be in the area adjacent to Dr. Sweeney's lot.
19. The Board found that Mr. Townsend stated that the Applicant is willing to install a fence to mitigate any noise that may be caused by the mechanical equipment.
20. The Board found that Mr. Townsend stated that the area along East Lake Drive is a thickly wooded area so the fence and pool will not be visible to passersby.
21. The Board found that Mr. Townsend stated that the pool cannot be located closer to the dwelling due to safety concerns and the need to access the home. He believes that this area is the only location where the pool can be located.
22. The Board found that Mr. Townsend stated that there are similar front yard pools in this area so it is not inconsistent with the neighborhood. He does not believe the pool will affect the quiet enjoyment of the neighborhood.
23. The Board found that Mr. Townsend stated that the economics of a lot like this necessitate a pool.
24. The Board found that Mr. Townsend stated that the pool is not large.
25. The Board found that Mr. Townsend stated that there is a unique, steep incline in the front yard that helps to mitigate and hide the pool.
26. The Board found that Ms. Beach testified that there is between 7 – 12 feet between the edge of paving of East Lake Drive to the property line which provides an existing vegetative buffer. She noted that the Applicant intends to plant additional vegetation on the Property to make this site more private.
27. The Board found that Ms. Beach testified that the fence will be approximately 7 – 12 feet from the road.
28. The Board found that Ms. Beach testified that the rise continues beyond the property line that the fence will be inconspicuous with plantings on either side.

29. The Board found that Ms. Beach testified that there will be coping around the pool 18 to 24 inches wide.
30. The Board found that Ms. Beach testified that there will be a terrace between the house and the pool.
31. The Board found that Ms. Beach testified that the mechanical equipment could not be placed under the steps at the rear of the house as they need to be set 3 feet from the structure.
32. The Board found that Mr. Townsend stated that the generator will be obscured and the pool equipment will be indiscreet if located in the front yard.
33. The Board found that Mr. Townsend stated that the Applicant tried to keep the pool away from steps to provide additional safety.
34. The Board found that Mr. Townsend stated that the pool will be less objectionable than the prior pool.
35. The Board found that Mr. Townsend stated that the generator has not yet been installed but he has no specs as to the noise of the generator.
36. The Board found that Mr. Townsend stated that the entrance to the dwelling will be off Penn Street and there will be a garage under the house adjacent to the steps.
37. The Board found that Ms. Beach testified that the house was designed with the plan to add a pool.
38. The Board found that Ms. Beach testified that the mechanicals could not be added on the north side of the dwelling as there is a steep incline past the front door which would make it more challenging. She noted that they needed a flatter surface for the mechanical equipment.
39. The Board found that Mr. DiPaula testified that generator would self-test once a week and that the generator will have sound mitigation features. He noted that the generator would be propane-fueled.
40. The Board found that Mr. DiPaula testified that the house will be located on pilings that will be below ground and that the house will be on grade.
41. The Board found that Mr. DiPaula testified that he is not aware of any plans that the objecting neighbor (Dr. Diane Sweeney) has for her property.
42. The Board found that Mr. DiPaula testified that the dwelling will consist of 12,000 square feet.
43. The Board found that Mr. DiPaula testified that he is one of seven children and his home will be shared with three generations of his family.
44. The Board found that Mr. DiPaula testified that he is working to collaborate with neighbors.
45. The Board found that Mr. DiPaula testified that all the lots are approximately 75 feet wide but, because of the location on Penn Street, he has an additional 5 feet setback that neighboring lots do not have.
46. The Board found that Mr. DiPaula affirmed that the statements made by Mr. Townsend as true and correct except for the statement about the testing of the generator.
47. The Board found that no one appeared in support of or in opposition to the Application.
48. 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 for the variances for the pool and fence met the standards for granting a variance. The findings below further support the Board's decision to approve the variances for the pool and fence.
 - a. The Property is unique as it is a long, narrow lot subject to significant DNREC building restrictions. The Property is adjacent to beaches of the Atlantic Ocean and much of the easterly side of the lot is undevelopable due to the DNREC building restrictions. As such, the proposed dwelling is pushed towards the western side of the Property adjacent to East Lake

Drive. The Applicant seeks to construct a pool away from the Atlantic Ocean but is unable to do so within the building envelope. Moreover, the Zoning Code requires that pools have a fence of at least 4 feet tall but fences in the front yard are limited to 3.5 feet tall. The Property's unique conditions have thus created an unnecessary hardship and exceptional practical difficulty for the Applicant who seeks to construct pool in a similar location to a prior pool on the lot and reasonable fence for the pool.

- 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 Property and the situation, the Property cannot be developed in strict conformity with the Sussex County Zoning Code. The Applicant seeks to construct a pool and fence but is unable to do so while complying with the Sussex County Zoning Code. The Board is thus convinced that the variances for those structures are necessary to enable the reasonable use of the Property as the variances will allow the Applicant to construct the pool and fence on the lot. The Board is convinced that the size, shape, and location of the structures are reasonable. The Board notes that this amenity was previously found on the lot and is similar to other pools in the neighborhood. The pool is also not large.
- d. The unnecessary hardship and exceptional practical difficulty were not created by the Applicant. As discussed above, the Property has unique conditions which have limited the Applicant's ability to reasonably develop the Property. The Applicant did not create the unique conditions of the lot as the Applicant only recently acquired the Property with the dune setback restrictions in place. The Board was convinced that the Applicant has not created the exceptional practical difficulty and unnecessary hardship. Furthermore, the Board is convinced that, as it pertains to the variances for the pool and fence, the Applicant did not come to the Property with an illegal use in mind. Rather, the Applicant is limited by the physical conditions of the Property and the Applicant needs these variances in order to reasonably develop the Property as proposed. The Board notes that the proposed pool is located in a similar location from the prior pool but is actually farther away from the front property line than the prior pool.
- e. The variances for the pool and fence 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 variances for the pool and fence will have no effect on the character of the neighborhood. The variances for the pool and fence will allow the Applicant to construct a reasonably sized pool and fence. The pool will be located in a similar location to a prior pool and there was no evidence that the prior pool negatively impacted the neighborhood. The Board notes that the pool and fence will be shielded by existing and proposed vegetation. There were no complaints about the location of the structures. Likewise, there was no objection to the proposed pool and fence and no evidence was presented which demonstrate that the variances for those structures would somehow alter the essential character of the neighborhood or be detrimental to the public welfare. Rather, the Board received letters of support from neighbors about the Application for the pool and fence variances.
- f. The variances sought for the pool and fence 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 for the pool and fence will allow the

Applicant to build a reasonably sized pool and fence which would otherwise be difficult to place on the lot due to the lot's unique conditions.

- 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.

49. 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 for the variance for the mechanical equipment failed to meet the standards for granting a variance. The findings below further support the Board's decision to deny the variance for the mechanical equipment.

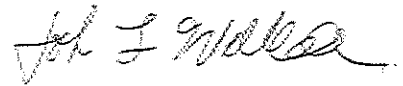
- a. The Applicant failed to demonstrate that the variance for the mechanical equipment was needed and that the mechanical equipment could not be placed in strict conformity with the Code. The mechanical equipment includes pool equipment and a generator for the home. The generator is for emergency use only and the Applicant failed to demonstrate why having a generator was needed for the Applicant to reasonably use the Property. The Board notes that other mechanical equipment, such as HVAC systems, will be located in compliance with the Code. The pool equipment, while needed for the pool to function, appears to be located in the side yard due to the Applicant's preference rather than a necessity. The Board was not convinced that the pool's mechanical equipment could not elsewhere be located on the lot in conformity with the Code; particularly since the structures have not yet been placed on the lot.
- b. The Board finds that the Applicant is creating his own exceptional practical difficulty by proposing to place the mechanical equipment on the lot outside the building envelope. The Applicant's decision to place the equipment in this location is the reason for the need for variance and has nothing to do with the size, shape, or condition of the Property. While the depth of the building envelope is limited due to the dune setbacks, the width of the lot is not unnecessarily limited by those setbacks. The Applicant argues that the corner front yard setback creates an additional limitation but the Board was not convinced that the existence of a corner yard setback, which is imposed to keep structures set back appropriately on corner lots, should be considered a strong reason to obtain a variance; particularly when the relief sought is greater than the additional setback of a corner lot. Simply put, the Board was not convinced that the variance request for the mechanical equipment was the product of a *need*. Instead, the variance request for the mechanical equipment appears to be the product of a *want* as the Applicant seeks to place the mechanical equipment in this location for purposes of convenience, profit, and / or caprice. Moreover, since the Applicant is designing the home and largely has a blank slate upon which to work, the Applicant has an opportunity to design the Property to accommodate the mechanical equipment within the building envelope. Rather, the Applicant has chosen to maximize the building envelope for financial reasons. As a result, the house occupies most of the width of the building envelope thereby leaving little space for the mechanical equipment on the side of the house. As it pertains to the mechanical equipment, the Board finds that the Applicant has created his own exceptional practical difficulty.
- c. Since the variance for the mechanical equipment is not necessary to enable the reasonable use of the Property, the Board also finds that the variance requested for the mechanical equipment is not the minimum variance necessary to afford relief.

The Board granted the variance application for the pool and fence finding that the variance application for the pool and fence met the standards for granting a variance and denied the variance application for the mechanical equipment finding that the variance application for the mechanical equipment did not meet the standards for granting a variance.

Decision of the Board

Upon motion duly made and seconded, the variance application for the pool and fence was approved and the variance application for the mechanical equipment was denied. The Board Members in favor of the motion to approve the variances for the pool and fence and to deny the variance for the mechanical equipment 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 approve the application for the pool and fence and to deny the variance application for the mechanical equipment.

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 March 21, 2022