

**BEFORE THE BOARD OF ADJUSTMENT OF SUSSEX COUNTY**

**IN RE: MICHELLE MCNICHOL & JEWELL ESTES**

**(Case No. 12663)**

A hearing was held after due notice on March 7, 2022. The Board members present were: Dr. Kevin Carson, Mr. Travis 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 requirements for proposed structures.

Findings of Fact

The Board found that the Applicants are requesting the following variances:

1. A variance of 14.1 feet from the thirty (30) feet front yard setback requirement from Daisey Road for a proposed garage;
2. A variance of 18.7 feet from the thirty (30) feet front yard setback requirement from Daisey Road for a proposed garage;
3. A variance of 21.1 feet from the thirty (30) feet front yard setback requirement from Bay Road for a proposed pool house;
4. A variance of 24 feet from the thirty (30) feet front yard setback requirement from Bay Road for a proposed pool house;
5. A variance of 11.8 feet from the thirty (30) feet front yard setback requirement from Bay Road for a proposed pool;
6. A variance of 17.6 feet from the thirty (30) feet front yard setback requirement from Bay Road for a proposed pool;
7. A variance of 20.3 feet from the thirty (30) feet front yard setback requirement from Bay Road for a proposed pool;
8. A variance of 13.8 feet from the thirty (30) feet front yard setback requirement from Bay Road for a proposed walkway;
9. A variance of 19.6 feet from the thirty (30) feet front yard setback requirement from Bay Road for a proposed walkway;
10. A variance of 24 feet from the thirty (30) feet front yard setback requirement from Bay Road for a proposed walkway;
11. A variance of 19 feet from the thirty (30) feet front yard setback requirement from Bay Road for a proposed outdoor kitchen;
12. A variance of 16.1 feet from the thirty (30) feet front yard setback requirement from Bay Road for a proposed outdoor kitchen; and
13. A variance of 2.5 feet from the 3.5 feet maximum fence height requirement in a front yard setback along Bay Road for a fence.

This application pertains to property that is a through lot located on the west side of Daisey Road and the east side of Bay Road (911 Address: 20642 Daisey Road, Rehoboth Beach); said property being identified as Sussex County Tax Map Parcel Number 334-19.12-43.00 (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 site plan of the Property dated October 5, 2020, a comparison drawing

showing the existing and proposed footprints, photographs, letters in support of the Application, and a portion of the tax map of the area.

2. The Board found that the Office of Planning & Zoning received five (5) letters in support of and no correspondence in opposition to the Application.
3. The Board found that Michelle McNichol and Jewel Estes were sworn in to give testimony about the Application. William Schab, Esquire, appeared on behalf of the Applicants.
4. The Board found that Mr. Schab stated that the Property is unique because it fronts on two roads. He stated that both roads dead end at the Property and the Applicants only have vehicular access to Daisey Road. He also noted that the variances have no impact on the visibility on those roads.
5. The Board found that Mr. Schab stated that his clients have gone to extreme lengths to design a home specific to their needs.
6. The Board found that Mr. Schab stated that the Applicants have owned the Property for nineteen (19) years and that the existing house is an older beach type home that the Applicants wish to modernize. He noted that the Applicants have had numerous meetings with Planning and Zoning staff and have done their best to request the bare minimum variances to meet their needs.
7. The Board found that Mr. Schab stated that the shape and size of the lot make it unique.
8. The Board found that Mr. Schab stated that one side of the Property is bordered by Spring Lake Condominiums.
9. The Board found that Mr. Schab stated that each neighbor has been made aware of these plans and support the requests.
10. The Board found that Mr. Schab stated that the proposed garage will be far less encroaching than the existing garage.
11. The Board found that Mr. Schab stated that the Applicants need no side yard setback variances but the rear of the Property along Bay Road requires the majority of the variances. He argued that the side of the yard fronting on Bay Road is unusable without the variances.
12. The Board found that Mr. Schab stated that these variances will affect only his clients.
13. The Board found that Mr. Schab stated that the Applicants did not place the roads or determine the size of the lot.
14. The Board found that Mr. Schab stated that the neighborhood consists of older beach houses being modernized as residents are now more full-time. He also noted that there are multi-family homes close to the Property and the neighborhood is filled with a variety of types and styles of homes. He believes that the structures will benefit the neighborhood.
15. The Board found that Mr. Schab stated that the Applicants will need a fence with the pool.
16. The Board found that Mr. Schab stated that the Applicants intend to use the Property as though Bay Road did not exist.
17. The Board found that Mr. Schab stated that the shed is being removed from the Property.
18. The Board found that Ms. McNichol and Ms. Estes affirmed the statements made by Mr. Schab as true and correct.
19. The Board found that Ms. McNichol testified that Bay Road terminates into Thompson Island Reserve and that there are only 3 houses on properties along Bay Road.
20. The Board found that Ms. McNichol testified that the home will be designed to allow the Applicants to age in place with first-floor living because she had 6 surgeries in recent years and needs to maximize first-floor living. She noted that the home will have room for a caretaker as well.

21. The Board found that Ms. McNichol testified that she is in her sixties and plans to install an elevator in the garage for future use. She noted that they cannot install an elevator in the current structure.
22. The Board found that Ms. McNichol testified that the Applicants have not yet spoken with an architect and do not know the square footage of the proposed home.
23. The Board found that Ms. McNichol testified that the outdoor kitchen is a porch with kitchen built in.
24. The Board found that Ms. McNichol testified that their neighbors use their homes for summer homes and not as primary residences.
25. The Board found that Ms. McNichol testified that their road has little to no traffic and there is little traffic to the state park area. She noted that most traffic to the park is mainly by persons to walk dogs.
26. The Board found that Ms. McNichol testified that she is aware that the county has done a walking tour before but, in twenty (20) years, she has never seen one.
27. The Board found that Ms. McNichol testified that the front of the Property is Daisey Road and that their address and mail box are on Daisey Road.
28. The Board found that Ms. McNichol testified that the proposed pool is an in-ground pool and the deck will be on the ground as they are trying to make everything one step or less. She noted they are unsure of the construction of the pool house as it depends on the type of pool purchased and placed.
29. The Board found that Ms. McNichol testified that the Applicants are not developing their lot significantly more than their neighbors and that they have seen different variations of styles of homes around them. She noted that they do not know how neighbors plan to develop their lots but multiple neighbors have pools.
30. The Board found that Ms. McNichol testified that there is no HOA approval needed.
31. The Board found that Ms. McNichol testified that the design they have submitted is a scaled back version which they did after consulting with their attorney. She noted that they have made numerous changes to the plans over the past 3 years.
32. The Board found that Ms. McNichol testified that the garage looks to be a third of the footprint.
33. The Board found that Ms. McNichol testified that they are just asking for the variances to maintain quality of life.
34. The Board found that Ms. McNichol testified that they are not saying that all of these variances are essential to their living but they are trying to maximize the area they do have.
35. The Board found that Ms. McNichol testified that their back yard is enclosed by a solid white vinyl fence and Spring Lake has a fence along their side yard.
36. The Board found that Ms. Estes testified that Bay Road terminates into a state park and there is a small parking area that transitions into a walking path.
37. The Board found that Ms. Estes testified that the pictures demonstrate that the Applicants would not be changing the essential look of the home compared to what is there now.
38. The Board found that Ms. Estes testified that no one would know they have a pool due to the fence.
39. The Board found that Ms. Estes testified that the garage is currently on the property line and the Applicants propose adding a second-story bay to the garage and pushing the garage to the back.
40. The Board found that Ms. Estes testified that the Applicants hope to retire and spend the next thirty (30) years there.
41. The Board found that Ms. Estes testified that their neighbors received variances for other things and sent in letters of support.
42. The Board found that Ms. Estes testified that their neighborhood consists of many residents who plan on remodeling their homes.

43. The Board found that Ms. Estes testified that they were told that their home used the most oil in Rehoboth and that the house is uninsulated.
44. The Board found that Ms. Estes testified that they were previously told that their home could not be built upon as it is not structurally sound so their plan is to start from scratch with a new home.
45. The Board found that Ms. Estes testified that the front of the Property is Daisey Road and they consider the Bay Road side of the lot to be the rear yard. She also noted that the mailbox is on Daisey Road.
46. The Board found that Ms. Estes testified that they are demolishing their current home and rebuilding but the foundation would be reused if possible as they wanted to use the same footprint.
47. The Board found that Ms. Estes testified that the home will consist of possible 3,200 square feet and they plan to install an elevator in the garage to provide access to the house.
48. The Board found that Ms. Estes testified that there is only one bedroom with no bathroom on the first floor and, due to the nature of the home, they cannot remodel.
49. The Board found that Ms. Estes testified that they have been told by architects that they will not touch this project until they receive the necessary variances.
50. The Board found that Ms. Estes testified that the Applicants propose an in-ground pool with a ground-level pool deck.
51. The Board found that Ms. Estes testified that the Applicants have spent two (2) years trying to get this figured out and have scaled back their designs.
52. The Board found that Ms. Estes testified that the neighborhood is changing and is eclectic. She noted that neighboring houses have recently done renovations and the Applicants are trying to do the same.
53. The Board found that Ms. Estes testified that the Applicants do not have vehicular access to Bay Road.
54. The Board found that Ms. Estes testified that no homeowner association approval is needed.
55. The Board found that Ms. Estes testified that their outdoor area is a tremendous amount of work to store the furniture for the winter and they are trying to make it a more reasonable amount of work.
56. The Board found that Ms. Estes testified that Ms. McNichol is arthritic and would be using the pool and hot tub in a therapeutic manner.
57. The Board found that no one appeared in support of or in opposition to the Application.
58. 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 from Bay Road and for the 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 with an angled lot line along Bay Road and adjacent to two roads thereby subjecting the Property to the through lot setback requirements even though the Property only has vehicular access to Daisey Road. The situation is also unique because the Property is developed by an older home that lacks insulation and cannot be renovated due to its existing structural design. Additionally, Ms. McNichol suffers from health problems which necessitate first-floor living and a pool for therapeutic uses. The Property's unique conditions have thus created an unnecessary hardship and exceptional practical difficulty for the Applicants who seek to construct a pool, pool house, walkway, outdoor kitchen, and fence.
  - 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 Applicants seek to construct a pool, pool house, walkway, outdoor kitchen, and fence but are 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 Applicants to construct the pool, pool house, walkway, outdoor kitchen, and fence on the lot. The Board is convinced that the size, shape, and location of the structures are reasonable. The Board notes that Ms. McNichol suffers from health problems which necessitate first-floor living and a pool for therapeutic uses.
- d. The unnecessary hardship and exceptional practical difficulty were not created by the Applicants. As discussed above, the Property has unique conditions which have limited the Applicants' ability to reasonably develop the Property. The Applicants did not create the unique conditions of the lot. The Board was convinced that the Applicants have not created the exceptional practical difficulty and unnecessary hardship. Furthermore, the Board is convinced that, as it pertains to the variances for the pool, pool house, walkway, outdoor kitchen, and fence, the Applicants did not come to the Property with an illegal use in mind. Rather, the Applicants are limited by the physical conditions of the Property and the Applicants need these variances in order to reasonably develop the Property as proposed. The Board notes that the Property is subject to the through lot setback requirements but only has vehicular access to Daisey Road.
- e. The variances for the pool, pool house, walkway, outdoor kitchen, 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, pool house, walkway, outdoor kitchen, and fence will have no effect on the character of the neighborhood. The variances for the pool and fence will allow the Applicants to construct a reasonably sized pool, pool house, walkway, outdoor kitchen, and fence. The Board notes that structures will be shielded by existing and proposed fences. There was no objection to the proposed pool, pool house, walkway, outdoor kitchen, 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 those variances. The Board also notes that Bay Road is a lightly traveled street and the proximity of these structures close to Bay Road should not present visibility concerns for traffic along Bay Road.
- f. The variances sought for the pool, pool house, walkway, outdoor kitchen, 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 Applicants have demonstrated that the variances sought for the pool, pool house, walkway, outdoor kitchen, and fence will allow the Applicants to build reasonably sized structures which would otherwise be difficult to place on the lot due to the lot's unique conditions. The Board notes that the Applicants need these structures to provide Ms. McNichol with functional outdoor space.
- 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.

59. 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 garage failed to meet the standards for granting a variance. The findings below further support the Board's decision to deny the variance for the garage.
- a. The Applicants failed to demonstrate that the variance for the garage was needed and that the garage could not be placed in strict conformity with the Code. The Applicants intend to remove the existing house and garage and replace the same with a new house and garage. In effect, the Applicants have a blank slate upon which to place those structures. While the lot is small, it benefits from the small lot ordinance and the Board is granting relief from the Bay Road side of the lot for other structures. In effect, the Applicants are seeking variances from both the front and the rear of the lot (although Bay Road is considered a front also). The Board finds that this request is an overreach and that the Applicants should design the house and garage to meet the setback requirements. The Board notes that the Applicants have not yet designed the house and garage and the Board was not convinced that those structures could not be placed within the building envelope in compliance with the Code.
  - b. As it pertains to the garage, the Board finds that the Applicants are creating their own exceptional practical difficulty by proposing to place the garage on the lot outside the building envelope. The Applicants' decision to place the garage 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 lot is small, the lot already benefits from reduced side yard setbacks and the Board has approved variances from Bay Road for structures. These conditions afford the Applicants with a sizeable building envelope for the house and the garage. Simply put, the Board was not convinced that the variance request for the garage was the product of a *need*. Instead, the variance request for the garage appears to be the product of a *want* as the Applicants seek to place the garage in this location for purposes of convenience, profit, and / or caprice. Moreover, since the Applicants are designing the home and largely have a blank slate upon which to work, the Applicants have an opportunity to design the Property to accommodate the garage within the building envelope. Rather, the Applicants have chosen to maximize the building envelope. As a result, the proposed house occupies most of the depth of the building envelope thereby leaving little space for the garage. As it pertains to the garage, the Board finds that the Applicants have created their own exceptional practical difficulty.
  - c. Since the variances for the garage are not necessary to enable the reasonable use of the Property, the Board also finds that the variances requested for the garage are not the minimum variances necessary to afford relief.

The Board granted the variance application for the pool, pool house, walkway, outdoor kitchen, and fence finding that the variance application for the pool, pool house, walkway, outdoor kitchen, and fence met the standards for granting a variance and denied the variance application for the garage finding that the variance application for the garage 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, pool house, walkway, outdoor kitchen, and fence was approved and the variance application for the garage was denied. The Board Members in favor of the motion to approve the variances for the pool, pool house, walkway, outdoor kitchen, and fence and to deny the variance for the garage were: Dr. Kevin Carson, Mr. Travis Hastings, and Mr. Jordan Warfel. Mr. John Williamson voted against the motion to approve the application for the pool, pool house, walkway, outdoor kitchen, and fence and to deny the variance application for the garage. Mr. Jeffrey Chorman did not participate in the discussion or vote on this 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 May 2, 2022