

BEFORE THE BOARD OF ADJUSTMENT OF SUSSEX COUNTY

IN RE: ELIZABETH McGUINNESS & PATRICK McGUINNESS

(Case No. 12758)

A hearing was held after due notice on November 7, 2022. The Board members present were: Dr. Kevin Carson, Mr. Jeffrey 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 building height restriction for a proposed protective screen.

Findings of Fact

The Board found that the Applicants are requesting a variance of 31 feet from the 42 feet maximum height requirement for a proposed protective screen. The property is located on the west side of Ellender Court within the Kings Creek Country Club Subdivision (911 Address: 5 Ellender Court, Rehoboth Beach) said property being identified as Sussex County Tax Map Parcel Number: 334-13.00-1065.00 ("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, property record information, a deed to the Property, a survey of the Property dated June 2, 2020, a proposal from a netting company, materials from Case No. 12097, letters supporting the Application, approval from the Kings Creek Residential Community Architectural Review Committee, 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 Elizabeth McGuinness was sworn in to give testimony about the Application. Mackenzie Peet, Esquire, and Stephen Spence, Esquire, presented the Application on behalf of the Applicants.
4. The Board found that Ms. Peet stated that the Property is located adjacent to the 9th hole at the Kings Creek Country Club golf course and the Applicants seek a variance to allow for a 73 feet high golf net to extend across the rear length of the Property to serve as a protective screen from golf balls that enter the Property.
5. The Board found that Ms. Peet stated that a significant portion of the Property is lined with mature trees but not directly behind the Property and that the lack of trees behind the Property is why the Applicants have golf balls that fly into their yard.
6. The Board found that Ms. Peet stated that the 9th hole was redesigned and the bunkers were relocated and created a bigger issue.
7. The Board found that Ms. Peet stated that the Property is unique because it is located adjacent to the 9th hole. She noted that the Property's location adjacent to the golf course has led to increased safety issues presented by recent alterations to that hole.
8. The Board found that Ms. Peet stated that, per the net's installer, constructing this protective barrier at 42 feet tall would not be high enough to provide protection and that, without the requested height variance, there would be a significant safety issue and golf balls would continue to enter the backyard.
9. The Board found that Ms. Peet stated that the Applicants are only intending to install this netting to improve safety to the rear yard.
10. The Board found that Ms. Peet stated that the exceptional practical difficulty was not created by the Applicants as the redesign of the 9th hole was done by Kings Creek.

11. The Board found that Ms. Peet stated that the installation of the net is to prevent stray golf balls from entering the Property.
12. The Board found that Ms. Peet stated that Kings Creek is a golf community and the Applicants have support of the neighbors and approval from the architectural review committee.
13. The Board found that Ms. Peet stated that, according to the installer, a 73 ft. high fence is the minimum height required to prevent golf balls from entering into the Property.
14. The Board found that Ms. Peet stated that this issue is unique to the Property.
15. The Board found that Mr. Spence stated that the 9th hole is a dog leg right hole and that the pro tee box is located farther back. He noted that, if you are trying to cut off the distance to the hole, you want to land in an area adjacent to the McGuiness' back yard and that, if you are off, the ball will land in the McGuiness' property. According to Mr. Spence, anyone trying to shorten the hole cuts to the right which increases the volume of golf balls in the Property.
16. The Board found that Mr. Spence stated that the Applicants' house is relatively close to the rear property line which is part of the problem.
17. The Board found that Mr. Spence stated that, some years ago, the Board approved a higher fence of about 100 feet to be placed at the driving range to protect the Country Club's clubhouse.
18. The Board found that Mr. Spence stated that the variance requested in this case is for a 73 feet tall net which should be adequate.
19. The Board found that Mr. Spence stated that there has been a redesign of the 9th hole. He noted that, prior to the redesign, there were four (4) bunkers and now there are only two (2) bunkers. He noted that the adjustment of the bunkers has made the hole more challenging and increased the number of golf balls in the McGuiness' yard.
20. The Board found that Mr. Spence stated that the bunkers surrounded what was supposed to be the landing area off the tee and that, on this particular hole, the Country Club removed two (2) bunkers but replaced them with a more aggressive bunker setup. He noted that, to shorten up on this hole, the only place to aim for is the closest spot to Ms. McGuiness' backyard and that a lot of people coming off the tee box aim in that direction because on the other side is a pond and creek. He does not believe the Country Club considered the impact on the Property when making the modifications to the course as the Country Club created an incentive for golfers to shoot in that direction rather than away from Ms. McGuiness' property.
21. The Board found that Mr. Spence stated that there are protective fences in other locations but none this high. He noted that there are protective fences at the 3rd hole which is about 25 feet high, at the par five (5) behind it, and at least one (1) other fence within the community.
22. The Board found that Mr. Spence stated that there are too many balls that are still in the air 30, 40, or 50 feet after being hit by a driver and that results in a dangerous situation.
23. The Board found that Mr. Spence stated that the trees are loblollies, hickories, and other large species of tree and the net will not be taller than the trees.
24. The Board found that Mr. Spence stated that the Country Club changed the fairway and not the hole.
25. The Board found that Mr. Spence stated that he has lived in Kings Creek since 2002.
26. The Board found that Mr. Spence stated that the advice from the engineer was that a fence measuring 42 feet high would not be tall enough.
27. The Board found that Mr. Spence stated that the installation of this safety netting will also shield the Applicants' neighbors from stray balls.
28. The Board found that Ms. McGuiness affirmed the statements made by her attorneys.

29. The Board found that Ms. McGuiness testified that, on a typical summer weekend day that she has at least ten (10) golf balls enter the Property and the problem worsened after the changes to the 9th hole.
30. The Board found that Ms. McGuiness testified that the Applicants are trying to minimize the golf balls in not only their yard but in the woods and their landscaping.
31. The Board found that Ms. McGuiness testified that she watches people try to retrieve their balls and that typically they do not venture far into her property but she has had people in her bushes up by her porch. She noted that her dog tends to greet the people on her property.
32. The Board found that Ms. McGuiness testified that two (2) days ago she had a golf ball land inches from her backdoor and it is still there because they did not want to come close enough to get it.
33. The Board found that Ms. McGuiness testified that she does not use her backyard but rather sits on her porch because of the safety issue and her grandchildren do not go in the backyard either.
34. The Board found that Ms. McGuiness testified that the Applicants have put in a fire pit and they have things that they would like to enjoy as a family but have not been able to because of this issue.
35. The Board found that Ms. McGuiness testified that the left side of the lot is wooded and the some trees are higher than 100 feet.
36. The Board found that Ms. McGuiness testified that the netting system will have four (4) posts, three (3) of which will be in the woods and the fourth to the right of the biggest tree.
37. The Board found that Jack Young was sworn in to give testimony in support of the Application.
38. The Board found that Mr. Young testified that he resides next door to the Applicants.
39. The Board found that Mr. Young testified that the course has changed and it has affected the Property. He believes that the safety issue alone warrants a variance.
40. The Board found that Mr. Young testified that the Property is unique because it is subject to a great deal of golfer mistake and that, if you shank the ball, which is possible, it is as likely as not that you will end up in the yard of Ms. McGuiness or possibly his yard.
41. The Board found that Mr. Young testified that, as Ms. McGuiness' counsel stated, the Applicants have received approval from the architectural review committee and he has heard of no contention from any neighbors. He also does not believe that this net will alter the character of the neighborhood.
42. The Board found that Mr. Young testified that this request is the minimum variance for the safety of the Property and that this net will also benefit other homes adjacent to the Property.
43. The Board found that Mr. Young testified that they have tried everything to avoid seeking a variance. He noted that they have tried some netting of their own and it has not been successful.
44. The Board found that Mr. Young testified that the netting they are proposing is consistent with variances granted prior within the community and that the netting will not be intrusive to the neighborhood and is fully supported by the neighborhood.
45. The Board found that one person appeared in support of and no one appeared in opposition to the Application.
46. 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 its proximity to the 9th hole of the Kings Creek Country Club. The 9th hole was recently redesigned and the resulting

changes to the 9th hole encouraged golfers to shoot for an area near the Property. Many golfers, however, miss the landing area and golf balls often enter the Property's rear yard from tall heights. The Applicants have consulted with a netting installation company and determined that a taller netting system is needed to safely prevent golf balls from entering the Property. Evidence and testimony clearly show that errant golf balls have landed on the Property and landed close to the Applicants' house. These errant shots have caused the Applicants to limit their usage of the rear yard. The Applicants, thus, need to construct a taller netting system to improve the safety of the Property but the Applicants are unable to do so without violating the Sussex County Zoning Code. The Board finds that the frequent intrusion of golf balls onto the Property has created an exceptional practical difficulty and unnecessary hardship for the Applicants who seek to construct netting system that is tall enough to prevent golf balls from entering the Property.

- 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, the Property cannot be developed in strict conformity with the Sussex County Zoning Code. The Property is located adjacent to a golf course that was recently redesigned and the Applicants have experienced an increase in golf balls entering the Property. According to professionals consulted with by the Applicants, a netting system that is 42 feet tall is insufficient to adequately keep golf balls off the Property. In order to have a netting system that will protect the Property, the Applicants need to install a netting system which exceeds the height limits set forth in 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 a netting system, which is tall enough to protect the Property from balls hit from golf course, to be constructed on the Property. The Board is convinced that the size, shape, and location of the netting system are reasonable, which is confirmed when reviewing the survey and exhibits provided by the Applicants.
- d. The exceptional practical difficulty and unnecessary hardship were not created by the Applicants. The Property is located adjacent to a golf course that was recently redesigned and resulted in an increase in errant golf balls landing on the Property. Due to these physical conditions, the Applicants seek to install a netting system to protect against balls hit from the golf course but the netting system needs to exceed the height limitations set forth in the Sussex County Zoning Code to enhance the safety of the Property. The Board is convinced that the Applicants are otherwise unable to adequately protect the Property without a netting system which exceeds the height requirement. The exceptional practical difficulty and unnecessary hardship are the result of the Property's unique physical conditions and proximity to the recently redesigned golf course.
- 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 netting system will have no effect on the character of the neighborhood. The netting system will be adjacent to the golf course and should protect the Property and neighboring lands from errant golf shots. The Applicants received support from neighbors and the Applicants have approval from their homeowners association. The Board notes that similar netting systems are in place near the driving range as well. 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. Furthermore, this barrier should improve the safety in the area by preventing the Applicants' dogs from leaving the Property.

- f. The variance sought is the minimum variance necessary to afford relief and the variance requested represents the least modification possible of the regulation at issue. The Applicants has demonstrated that the variance sought will allow the Applicants to erect a netting system that will adequately protect the Property from the nearby golf course. The Board notes that a professional consultant recommended that the Applicants install a taller netting system than is allowed per the Code. The Board is also convinced that the Applicants explored other options, such as relocating shorter nets and vegetation, but those options were not feasible. The Board finds that the Applicants took reasonable measures to limit the height of the netting system while improving the safety of the Property
- g. The condition or situation of the Purcell Property and the intended use of the Purcell 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. Jordan Warfel, and Mr. John Williamson. No Board Member voted against the Motion to approve the variance application.

BOARD OF ADJUSTMENT
OF SUSSEX COUNTY



Jeffrey Chorman
Chair

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

Date January 9, 2023