

BEFORE THE BOARD OF ADJUSTMENT OF SUSSEX COUNTY

IN RE: JESSICA F. PEAKE

(Case No. 12416)

Hearings were held after due notice on February 17, 2020 and March 2, 2020. The Board members present were: Dr. Kevin Carson, Mr. Jeff Chorman, Ms. Ellen Magee, Mr. John Williamson, and Mr. Brent Workman.

Nature of the Proceedings

This is an application for variances from the front yard setback requirement for proposed structures, the landscape buffer requirement in the Combined Highway Corridor Overlay Zone (CHCOZ), and from the number of required parking spaces.

Findings of Fact

The Board found that the Applicant is requesting a variance of 45 feet from the sixty (60) feet front yard setback requirement for a proposed golf course, a variance of 5 feet from the twenty (20) feet landscape buffer requirement of the Combined Highway Corridor Overlay Zone, and a variance of 119 parking spaces from the required 125 on-site parking spaces (leaving six total onsite and 12 shared spaces with the adjoining site). These requests were modified from the initial application. This application pertains to certain real property located on the east side of Coastal Highway (Route 1) approximately 300 feet south of Jefferson Bridge Road (911 Address: 32967 Coastal Highway, Bethany Beach); said property being identified as Sussex County Tax Map Parcel Number 1-34-17.11-40.00. After a public hearing, the Board made the following findings of fact:

1. The Board was given copies of the Application, a site plan dated January 3, 2020, a survey of the Property dated March 16, 2015, a deed to the Property, portions of the Sussex County Zoning Code, literature on the golf course, a memorandum from Jamie Whitehouse to the Board, a landscape plan dated January 16, 2020, letters of support, an aerial photograph of the Property, 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 Nick Geracimos and Michael O'Neill were sworn in to give testimony about the Application. Mackenzie Peet, Esq., presented the Application on behalf of the Applicant.
4. The Board found that Ms. Peet stated that the Property consists of 0.46 acres and is located on the east side of Route 1 just south of Bethany Beach in the general commercial (C-1) district. The Property is located near residential and commercial uses including hotels and restaurants. The Applicant seeks these variances as part of a redevelopment plan to redevelop the Property from a liquor store to a miniature golf course. The Property was previously used for Beach Liquors.
5. The Board found that Ms. Peet stated that the Holiday Inn Express and Ocean Suites hotels, which are located nearby, support the Application.
6. The Board found that Ms. Peet stated that the Applicant operates 6 similar facilities in the area; including one in Dewey Beach.
7. The Board found that Ms. Peet stated that the lot is unique with an irregular tear-drop shape and that the lot is shallow and narrow to the south and wider to the north.
8. The Board found that Ms. Peet stated that the unique shaped lot does not allow the 18-hole miniature golf course to be built within the setback requirements.

9. The Board found that Ms. Peet stated that the variances are necessary to enable reasonable use of the Property and the exceptional practical difficulty has not been created by the Applicant but by the lot's uniqueness.
10. The Board found that Ms. Peet stated that the lot's shape was created prior to the Applicant's lease agreement.
11. The Board found that Ms. Peet stated that granting the variances will not alter the essential character of the neighborhood as it is zoned C-1 and is surrounded by C-1 lots with one adjacent lot zoned MR.
12. The Board found that Ms. Peet stated that the proposed uses will provide recreation to the Bethany Beach area and that the use will be seasonal in nature.
13. The Board found that Ms. Peet stated that there are multiple access points for the site. One access will be from Route 1 and the other access will be from Jefferson Bridge Road through the Holiday Inn Express parcel where the shared parking will be located.
14. The Board found that Ms. Peet stated that additional landscaping will be planted.
15. The Board found that Mr. Peet stated that the site does not have sufficient parking for this use so the Applicant will share parking with its neighbor.
16. The Board found that Ms. Peet stated that these variances represent the minimum variances to afford relief.
17. The Board found that Ms. Peet stated that the Zoning Code does not provide for a parking requirement for an outdoor commercial use and that an indoor commercial use is the most closely related use. An indoor commercial use would be required to have 125 parking spaces.
18. The Board found that Ms. Peet stated that there is a distinction between indoor and outdoor commercial uses and that 125 parking spaces are not required for the use of a miniature golf course.
19. The Board found that Ms. Peet stated that the expected patrons of the golf course will be mostly pedestrian coming from the Sea Colony development or local hotels where they have parked their cars.
20. The Board found that Ms. Peet stated that that the most parking required would be 36 spaces (2 per golf hole). The Applicant proposes there will be six onsite parking spaces and 12 off-site shared parking spaces which will be shared with the Holiday Inn Express. There will be a lease with the owner of the Holiday Inn Express to allow for the shared parking.
21. The Board found that Ms. Peet stated that DeIDOT provided a letter stating that the use of a miniature golf course will cause fewer than 500 trips per day and the Applicant anticipates that most of the traffic will come from the same side of Route 1 but they have no data to support that statement.
22. The Board found that Ms. Peet stated that the billboard will remain on the site.
23. The Board found that Mr. O'Neill testified that there will be pilings measuring 8 inches in diameter with rope going through them and 42-inch netting around the golf course.
24. The Board found that Mr. O'Neill testified that the design was based around the existing entrance and the design uses the same driveway as Beach Liquors. He believes that it would be difficult to park closer to Route 1.
25. The Board found that Mr. O'Neill testified that there is no curbing on the front of the site and there is no shrubbery in the front yard.
26. The Board found that Mr. O'Neill testified that he has a blank slate upon which to work.
27. The Board found that Mr. O'Neill testified that the golf course could not be flipped to have the course closer to the rear yard than the front yard.
28. The Board found that Mr. Geracimos testified that his property at Dewey Beach is also an 18-hole golf course and it is tight. All of his other golf courses are 18 hole courses. He believes that requiring his golf course to only have 9 holes would put

him in a disadvantage with his competitors in the area. He also noted that his other sites have a maximum of 18 parking spaces.

29. The Board found that Mr. Geracimos affirmed the statements made by Ms. Peet as true and correct.
30. The Board found that Ms. Peet stated that she was unsure if the Holiday Inn Express site was underparked or overparked but they believe 1-2 parking spaces per hole is the maximum needed.
31. The Board found that Ms. Peet stated that there is no gap to the edge of paving of Coastal Highway from the front property line.
32. The Board found that Paul Reiger and Keith Steck were sworn in to give testimony in opposition to the Application. Mr. Steck submitted exhibits to the Board to review. Both men had concerns about the parking and felt that the Application should have gone through the conditional use process before coming to the Board.
33. The Board found that Mr. Steck testified that the requested variances are too extreme. He noted that the front yard variance request is a 92% reduction and the landscape variance request is a 75% reduction.
34. The Board found that Mr. Steck testified that he has safety concerns for both drivers, pedestrians, and patrons and that the golf course presents a visibility concern.
35. The Board found that Ms. Peet stated that the kiosk measures 12 feet by 17 feet and not 10 feet by 10 feet as shown on the first plan.
36. The Board voted to leave the record open and the Board held a second hearing on March 2, 2020. At that hearing, Mr. Geracimos, Mr. O'Neill, and Jack Burbage were sworn in to testify about the Application. Additional letters of support, a new site plan, and other exhibits were submitted prior to the meeting.
37. The Board found that Ms. Peet stated that the Applicant has a similar parking arrangement in Ocean City with a hotel and restaurant.
38. The Board found that Ms. Peet stated that the request has been reduced as it pertains to the front yard variance and the CHCOZ variance. The original front yard variance request has been changed from a 55 feet variance from the 60 feet front yard setback requirement to a variance of 45 feet. The 15 feet variance from the 20 feet landscaped buffer requirement has been reduced to 5 feet. These reductions are the result of a reduction in the size of the golf course.
39. The Board found that Ms. Peet stated that the Applicant has provided for a shared use sidewalk should it be required by DeIDOT. The Applicant will address the entrance from Route 1 with DeIDOT as DeIDOT will require a commercial entrance.
40. The Board found that Ms. Peet stated that the entrance exists but there is no curbing.
41. The Board found that Ms. Peet stated that crepe myrtles will be planted in the buffer as they are multi-stemmed and will act as a stronger barrier and a greater visual screen around the Property.
42. The Board found that Ms. Peet stated that a ten-year lease has been executed with the owner of the Holiday Inn Express to allow for twelve parking spaces for the mini-golf course.
43. The Board found that Ms. Peet stated that the hotel has 100 rooms and 143 parking spaces.
44. The Board found that Ms. Peet stated that the parking spaces at the hotel will have signs designating the parking for the mini-golf course and violators risk having their vehicles towed. Spaces for bike racks will also be provided.
45. The Board found that Ms. Peet stated that the Applicant has similar shared parking agreements in Ocean City, where he only has 9 spaces, and that the Applicant believes he only needs 18 spaces.
46. The Board found that Mr. Geracimos affirmed the statements made by Ms. Peet as true and correct.

47. The Board found that Ms. Peet stated that there is an informal agreement for shared parking with Mickey's Crab House for six spaces if needed and that Mickey's Crab House has 14 spaces.
48. The Board found that Ms. Peet stated that the Applicant is working on a stormwater management plan and will be improving the stormwater conditions on the site as there will be more permeable surface.
49. The Board found that Ms. Peet stated that the Applicant also has to go to the Planning & Zoning Commission for approval.
50. The Board found that Mr. Geracimos testified that there are 2 employees at the golf course and that parking has not been an issue at other locations
51. The Board found that Mr. Burbage testified that this amenity will be a positive thing for Bethany.
52. The Board found that Mr. Burbage testified that there is ample parking on the Holiday Inn site which is owned by him and that he rarely sees the Holiday Inn parking lot full.
53. The Board found that Mr. Burbage testified that he expects most of the traffic to the miniature golf course will be either by bicycle or on foot from the local hotels and the Sea Colony development.
54. The Board found that Brenton Archut was sworn in to give testimony in opposition the Application.
55. The Board found that Mr. Archut testified that he and his mother own property on both sides of Coastal Highway which includes the Hickman Plaza south of the subject property. His property includes the location of the Cottage Café and is within walking distance of the Applicant's site.
56. The Board found that Mr. Archut testified that he is concerned about the parking variances because available parking is a premium in this area.
57. The Board found that Mr. Archut testified that they have had to hire parking monitors to make sure that the people using their services have available parking.
58. The Board found that Mr. Archut testified that the on-street parking in this area is almost non-existent and there is no public transportation in this area.
59. The Board found that Mr. Archut testified that he has concerns that the Holiday Inn with 100 rooms should have 150 parking spaces per Sussex County Code. He has seen the hotel's lot full of cars.
60. The Board found that Mr. Archut testified that he has concerns that patrons of the golf course will use their parking spaces.
61. The Board found that Mr. Archut testified that, while many people walk or bike in the area, there is still a lot of vehicle traffic and the number of parking spaces allotted will not be enough.
62. The Board found that Ms. Peet stated that Sea Shell Shop has a miniature golf course 7 feet from Route 1 and the Applicant has other golf courses which are closer to the road.
63. The Board found that Mr. Geracimos testified that he has 18 spaces at 4 other locations – 3 of which are in Ocean City and the parking lot is rarely full.
64. The Board found that Mr. Geracimos testified that there are lots of bikers to his site in Fenwick and he had to double the size of his bike racks to accommodate the bikers.
65. The Board found that Mr. Geracimos testified that the trees and fence will separate the golf course from Route 1 and that it is rare that balls leave the site.
66. The Board found that one person appeared in support to the Application and four persons appeared in opposition to the Application.
67. Based on the findings above and the testimony and evidence presented at the public hearings 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 prove that the Property could not be reasonably developed in strict conformity with the Sussex County Zoning Code. The Applicant proposes to construct a miniature golf course on this lot and the golf course will encroach significantly into the front yard setback area. The golf course will also encroach into the landscape buffer area and will require a parking variance. While the Applicant argued that it was constrained by the size and shape of the lot, the Applicant's designer also admitted that the Applicant has a blank slate upon which to work. The Applicant modified its request after the first hearing but the design still greatly encroaches into the front yard setback area and places the golf course close to Coastal Highway, where there is no existing sidewalk, curbing, or grass buffer. Notably, much of the rear corner of the lot which is farthest away from Route 1 is used for parking. This design has taken up part of the building envelope and pushed the golf course closer to Route 1. The Board also notes that the Applicant failed to demonstrate why a smaller golf course would not work on the site. Rather, the Applicant has chosen to use a significant portion of the lot - including large swaths of area outside the building envelope - for the golf course. The Board was simply not convinced that the Applicant could not otherwise develop the Property in compliance with the Code. Likewise, the Board was not convinced that the variances are necessary to enable reasonable use of the Property.
- b. The Board finds that the Applicant is creating its own exceptional practical difficulty by proposing to develop the Property with a miniature golf course which does not fit within the building envelope. The Applicant's decision to construct this golf course on this site 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 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 build the golf course as proposed for purposes of convenience, profit, and / or caprice. The Board notes that the proposed design of the Property is busy that there is little area of the Property which is not somehow used for the golf course. 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 its own exceptional practical difficulty.
- c. The Board finds that the proposed golf course will be detrimental to the public welfare. The Property is located in an area that suffers from traffic and parking problems during the summer months - which is the same time when the golf course will be in operation. Testimony from neighbors clearly demonstrates that parking is a problem and needs regular enforcement. While the Applicant proposes to use parking on a nearby property, the site itself will only have 6 spaces. The Board questions whether the neighboring property which will offer the shared spaces has sufficient parking as there was testimony that it is full at times. The reduction of the available spaces on the neighboring property will not alleviate that issue as the proposal will result in fewer spaces for the hotel. Rather, it is clear to the Board that the proposed parking variance will only further exacerbate a parking issue in the area.
- d. Since the variances are not necessary to enable the reasonable use of the Property, the Board also finds that the variances requested are not the minimum variance necessary to afford relief. Furthermore, the Board finds that no variances are needed to afford relief since the Applicant failed to

demonstrate that the Property could not otherwise be developed 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 Mr. Jeffrey Chorman, Ms. Ellen Magee, and Mr. John Williamson. Dr. Kevin Carson and Mr. Brent Workman voted against the motion to deny Application.

BOARD OF ADJUSTMENT
OF SUSSEX COUNTY



Ellen M. Magee
Chair

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

Date May 5, 2020.