

**RESOLUTION OF THE BOARD OF ADJUSTMENT
TOWNSHIP OF LONG HILL
MORRIS COUNTY, NEW JERSEY**

**PATRICK DWYER
58 DELAWARE AVENUE
STIRLING, NEW JERSEY 07980
BLOCK 13204, LOT 20
APPLICATION NO.: 21-15Z**

**Hearing Date: October 5, 2021
Board Action: October 5, 2021
Memorialization: October 19, 2021**

WHEREAS, Patrick and Erin Dwyer (the “Applicants”) are the owners of property located at 58 Delaware Avenue in Stirling, identified as Block 13204, Lot 20 (the “Property”) on the Long Hill Township Tax Map, in the R-2 Residential Zoning District; and

WHEREAS, the Applicants applied to the Board of Adjustment of the Township of Long Hill (the “Board”) with an application requesting relief from certain use and bulk standards and waivers in order to construct an addition to an existing single-family home and to install an in-ground swimming pool on the Property; and

WHEREAS, the Applicants previously sought and received approval (Application No. 2020-09Z) for a similar proposal to install an inground pool and a one-story addition to the existing dwelling, including the construction of two nested 2.5 foot high retaining walls located to the north of the pool (the “Prior Approval”); and

WHEREAS, the Applicants modified the plans to, inter alia, lower the existing grade along the rear of the dwelling and requested the following relief from the Board (the “Relief Requested”):

- i. Maximum Building Height (Ordinance Section 131 and N.J.S.A. 40:55D-70(d)(6)): Permitted: 2.5 stories/35 feet; Proposed 3 stories/39.4 feet;
- ii. Minimum Lot Area (Ordinance Section 131) – Existing Condition: Required: 45,000 sq. ft.; Existing and Proposed: 25,408;
- iii. Minimum Lot Width (Ordinance Section 131) – Existing Condition: Required: 150’; Existing and Proposed: 120’;
- iv. Minimum Front Yard Setback (Ordinance Section 131) – Existing Condition: Required: 75’; Existing and Proposed: 50.7’;
- v. Minimum Side Yard Setback (Ordinance Section 131) – Existing Condition: Required: 25’; Existing and Proposed: 18’;
- vi. Minimum Side Yard. Both Yards (Ordinance Section 131) – Existing Condition: Required: 36’; Existing and Proposed: 34.75’;
- vii. Maximum Lot Coverage (Ordinance Section 131):

Permitted: 20%; Existing: 20.6%; Proposed: 26%; and

- viii. Location of an accessory use within a steep slope area (Ordinance Section 142.1a); Rear Yard Setback from Critical Area (Ordinance Section 142.1d): Required: 50'; Proposed: 8'; and

WHEREAS, the Applicants submitted the following plans and documents in support of the Application, which plans and documents were made a part of the record before the Board, as follows:

- a. Application with addenda, dated August 10, 2021;
- b. "Plot Plan & Grading Plan, Proposed Addition and Pool at Block 13204, Lot 20, Long Hill Township, New Jersey," prepared by Finelli Consulting Engineers, dated July 16, 2020, last revised August 2, 2021, same consisting of two (2) sheets;
- c. "New Addition for Mr. & Mrs. Dwyer, Stirling, NJ," prepared O'Brien Architects, Inc., dated February 1, 2018, last revised April 5, 2021, consisting of nine (9) sheets;
- d. Property Survey entitled "Map of Property situated in Township of Long Hill, Morris County New Jersey" prepared by Benjamin & Wizorek, Inc., dated October 3, 2014; and
- e. Morris County Soil Conservation District Soil Erosion & Sediment Control Plan Certification dated June 16, 2021 certifying the plan conforms with the standards for Soil Erosion and Sediment Control in New Jersey; and

WHEREAS, the Applicants met all jurisdictional requirements enabling the Board to hear and act on the Application and appeared before the Board on the Hearing Date, as specified above; and

WHEREAS, the Board considered the following reports from its professionals:

- a. Memorandum from Board Planner, Elizabeth Leheny, PP, AICP, dated October 4, 2021; and
- b. Memorandum from Board Engineer, Richard Keller, PE, PP, CME, dated October 3, 2021; and

WHEREAS, during the public hearing on the Application on the Hearing Date, the Applicants, appearing *pro se*, were given the opportunity to present testimony and legal argument, and members of the public were given an opportunity to comment on the Application; and

WHEREAS, the Applicants presented testimony from the following individuals:

1. Patrick Dwyer, one of the Applicants; and
2. Joseph Modzelewski, PE, Applicants' Engineer; and

WHEREAS, members of the public appeared to ask questions about and to speak with regard to the Application, as more fully set forth on the record; and

WHEREAS, the Applicants introduced the Application and presented testimony to the Board as more fully set forth on the record, as follows:

1. The Board Professionals, Elizabeth Leheny, AICP, PP, the Board Planner, and Richard A. Keller, PE, PP, CME, the Board Engineer, were duly sworn according to law.

2. Patrick Dwyer was duly sworn according to law and testified generally regarding the proposal, including the modifications from the Prior Approval.

3. The Board Engineer, Mr. Keller, testified that the Applicants had previously been before the Board for a similar proposal. He explained that the Applicants had modified their proposal to lower the existing grade along the rear of the dwelling, which allows the Applicants to construct a walk-out basement, thereby eliminating the previously proposed basement egress stairs, as well as the two nested retaining walls on the north side of the pool. Mr. Keller further explained that the proposal, as modified, also resulted in the modification of the stairs from the proposed deck to the rear yard and the proposed pool equipment will be shielded from view by the new stairs and a proposed wingwall off of the rear house addition.

4. Joseph Modzelewski was sworn, provided his qualifications, and was accepted by the Board as an expert in the field of civil engineering. He testified that the Applicants prefer to install uncovered, formed concrete stairways to mitigate potential drainage issues. Mr. Modzelewski further testified that the Applicants also prefer a walk-out basement. He explained that, on compliance, the Applicants will be required to lower the existing grade along the rear of the dwelling in order to reduce the lowest ground elevation, thereby increasing the height of the structure as calculated pursuant to the Ordinance¹.

5. Mr. Modzelewski explained that, by lowering the existing grade, the Applicants can reduce the elevation of the proposed pool and replace the previously proposed nested retaining walls with a single 2.5-foot-tall retaining wall. He further explained that the reduced grade allows the Applicants to construct a walk-out basement.

6. Mr. Keller, the Board Engineer, confirmed that the previously approved plans included two retaining walls with fences, two basement egress stairs, and an inground pool, but at a grade of 5.5 feet higher. He explained that the revised plans provide for only one 2.5-foot-tall retaining wall, a 54" tall pool fence along the perimeter of the rear yard rather than on top of

¹ The Ordinance defines HEIGHT OF BUILDING as "The vertical distance from the lowest ground elevation around the foundation to the level of the highest elevation point of the roof surface."

the proposed retaining wall, and a walk-out basement given the reduction in grade.

7. Ms. Leheny, the Board Planner, explained that the Applicants' proposal requires d(6) height variance relief for the height (39.4 feet measured in feet) and bulk variance relief for the proposed building height (3 stories measured in stories), whereas the maximum permitted height is 35 feet/2.5 stories. She explained that a d(6) variance is required because the Applicant is seeking to exceed the maximum permitted height by 10 feet or 10% of the maximum height permitted (i.e., 10% of 35 feet is 3.5 feet, allowing for a 38.5 foot tall building, whereas the Applicants are proposing a height of 39.4.

8. Robert Gasalberti, having an address of 48 Delaware Avenue, was duly sworn according to law. He questioned whether the Applicants' changes to the grading would have a detrimental impact on his lot, particularly as to drainage. Mr. Modzelewski advised that the grading changes will not have any more of an impact than the prior plan. Mr. Modzelewski contended that the amended plan may actually constitute an improvement over the previously approved plan, particularly given the relocation of the drywell to the rear of the Property. Mr. Modzelewski explained that, by relocating the drywell, the Applicants can save at least two (2) of the three (3) trees previously proposed to be removed. On further questioning by Mr. Gasalberti, Mr. Modzelewski contended that he did not foresee any drainage issues on Mr. Gasalberti's property given the design of the stormwater management system. Mr. Gasalberti questioned the nature of the proposed fencing and was advised that the Applicants are proposing a perimeter fence, as well as a pool fence. Mr. Modzelewski advised that the height of the fence will be 4.5 feet tall and will comply with the pool fencing and general fencing Ordinance requirements as to materials/openness. Mr. Modzelewski further advised that the Applicants are proposing three (3) evergreen trees, having a height of at least 6 feet at planting, to screen the proposed addition.

9. Mr. Modzelewski summarized the benefits of the amended proposal as reducing the height of the pool, eliminating one of the previously proposed retaining walls, and generally improving the aesthetics and stormwater management conditions on the Property. He reminded the Board that the amended proposal does not increase the total impervious coverage above that which was previously approved.

DECISION

WHEREAS, the Board has made the following findings of fact and conclusions of law:

1. The Property is comprised of an improved 25,408 square foot parcel designated as Lot 20 in Block 13204, more commonly known as 58 Delaware Avenue, in the R-2 Residential Zoning District. The Property is improved with a two-story frame dwelling with an attached garage and rear deck and a shed in the northeast corner. The Property contains approximately 5,140 square feet of steep slopes in excess of 15% in the rear yard.

2. The Applicants propose to remove the existing deck and construct a single-story addition to the dwelling as well as to construct a walk-out basement. The Applicants further propose to construct a kidney shaped in-ground swimming pool and spa with appurtenant pool pad, concrete walkway, retaining wall, and drywell in the location of the rear yard. The Applicants'

proposed improvements deviate from certain use and bulk standards in the Ordinance, as enumerated in the Relief Requested. Thus, the Applicants have requested relief from the Board in the form of height variance relief in accordance with N.J.S.A. 40:55D-70(d)(6) and bulk variances in accordance with N.J.S.A. 40:55D-70c(1) and/or (2).

3. All jurisdictional requirements of the Application were met and the Board proceeded to hear the Application and render its determination, which is memorialized herein.

The d(6) Height Variance Relief:

4. As to the positive criteria, an applicant requesting height variance relief under N.J.S.A. 40:55D-70(d)(6) must prove, pursuant to Grasso v. Bor. of Spring Lake Heights, 375 N.J. Super. 41 (App. Div. 2004), special reasons, by demonstrating that the height restriction prohibits use of the property for a conforming structure, or in the alternative by demonstrating that the increased height of the building does not offend the purpose of the height restriction which the court characterized as being focused primarily on light and air concerns as well as being another method of controlling density.

5. Here, as to the positive criteria, the Board finds that the requested subsection d(6) height variance relief may be granted for the proposed height of the Applicants' dwelling. In this regard, the Board recognizes that the height of the dwelling is not increasing or otherwise changing, but rather the existing grade along the rear of the dwelling is being lowered, resulting in a "technical" height exceedance. As such, the Board finds that the Property can accommodate the excess height, particularly given the existing and proposed landscape screening, buffering and fencing, the installation of significant additional stormwater management facilities, and the balance of the stipulated to conditions. The Board further recognizes that granting the requested relief will not change the appearance of the dwelling from the structure or the adjacent properties. As such, the Board finds that the Applicants have satisfied the positive criteria for the requested subsection d(6) height variance.

6. As to the negative criteria for subsection d(6) variance relief, the applicant must prove that the increased height will not result in substantial detriment to the public good, or substantial impairment to the master plan or zoning ordinance.

7. Here, the Board recognizes that the proposed height of the building is not technically increasing from the height previously approved as part of the Prior Approval, and, therefore, will not result in substantial detriment to the public good. Moreover, while one member of the public, Mr. Gasalberti questioned the impact of the proposal on his property, he did not express an objection to the proposal itself. The Board further recognizes that the Applicants' proposed improvements are permitted in the R-2 Residential Zoning District and, therefore, certainly granting the requested relief does not rise to the level of a rezoning of the Property. As such, the Board finds that the Applicants have demonstrated that granting the requested relief will not result in substantial detriment to the public good or substantial detriment to the master plan and zoning ordinance.

8. As such, the Board finds that the Applicants have satisfied both the positive and the

negative criteria for the requested subsection d(6) height variance.

The Bulk Variance Relief – Positive Criteria:

9. An applicant requesting bulk variance under subsection “c” of N.J.S.A. 40:55D-70 must prove that it has satisfied both the positive and negative criteria. The positive criteria in bulk variance cases may be established by the Applicant’s showing that it would suffer an undue hardship if a zoning regulation were to be applied strictly because of a peculiar and unique situation relating to the property in accordance with N.J.S.A. 40:55D-70c(1). Under the subsection c(1) standard, an applicant must prove that the need for the variance is occasioned by the unique condition of the property that constitutes the basis of the claim of hardship. Relief may not be granted where the hardship is self-created. The positive criteria may also be established by a showing that the granting of an application for variance relief would advance the purposes of the Municipal Land Use Law and the benefits of the granting such relief would substantially outweigh any detriment associated therewith in accordance with N.J.S.A. 40:55D-70c(2). Under the subsection c(2) standard, an applicant must prove that the granting of a proposed deviation from the zoning ordinance represents a better zoning alternative and advances the purposes of the Municipal Land Use Law, as set forth in N.J.S.A. 40:55D-2. A c(2) variance should not be granted when the only purposes that will be advanced are those of the property owner. The focus of a c(2) variance is on the characteristics of the land that present an opportunity for improved zoning and planning that will benefit the community.

10. Here, the Board finds that the requested bulk or “c” variance relief may be granted under both of the alternative bases under subsections c(1) and c(2) for the deviations resulting from the Applicants’ proposal to construct an addition to the single-family residential dwelling and to install an in-ground swimming pool in a residential zoning district, as specified in the Relief Requested.

11. Pursuant to N.J.S.A. 40:55D-70(c)(1), the Board finds that by reason of exceptional narrowness, shallowness or shape of a specific piece of property, and by reason of exceptional topographic conditions or physical features uniquely affecting a specific piece of property, the strict application of the provisions of the Municipal Land Use Law would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon, the developer of such property. In this regard, the Board notes that the Property is undersized and, as such, no improvement may take place without necessitating variance relief from the Board. The Board further notes that the Property is also encumbered by critical slopes in the rear. The Board finds that the naturally occurring physical constraints present a hardship unique to the subject property. The Board further finds that it is not possible for the Applicant to obtain additional land in order to create a conforming or more conforming lot, as all of the lots surrounding the Property are improved. The Board is satisfied that the open space located to the rear of the Property, together with the Applicant’s agreement to comply with the conditions that have been imposed herein, sufficiently mitigates any negative aspects of the proposed development. As such, the Board finds that the Applicants have demonstrated the positive criteria for the requested variance relief under subsection c(1).

12. Pursuant to N.J.S.A. 40:55D-70(c)(2), the Board further finds that granting the requested relief advances the purposes of the Municipal Land Use Law and that the benefits

associated with the proposal substantially outweigh the detriment associated therewith. Specifically, the Board finds that the proposal advances purposes (a), (c), and (i), in that it promotes the public health, safety, morals and general welfare; provides adequate light, air and open space' and promotes a desirable visual environment. In this regard, the Board recognizes that the proposed pool and related improvements are located to the rear of the dwelling and will be screened not only by the existing dwelling, but also the proposed additional landscaping. The Board further finds that the benefits of granting the requested relief substantially outweigh the detriment associated therewith particularly given the unrefuted expert testimony that the Applicants' amended proposal allows for better integration of the pool with the rear yard topography, allows the Applicants to preserve additional trees, and otherwise constitutes an improvement to the previously approved plans. As such, the Board finds that the Applicants also have demonstrated the positive criteria for the requested variance relief under subsection c(2).

The Bulk Variance Relief – Negative Criteria:

13. In order to satisfy the negative criteria for “c” variance relief, an applicant must prove that the variance can be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of the zone plan and zoning ordinance. The requirement that the grant of the variance relief not substantially impair the intent and the purpose of the zone plan and zoning ordinance focuses on whether the grant of the variance can be reconciled with the zoning restriction from which the applicant intends to deviate.

14. Here, for the reasons set forth above in paragraph 7, the Board finds that the Applicants have satisfied both the positive and negative criteria for the requested bulk variance relief.

NOW, THEREFORE, BE IT RESOLVED, on the basis of the evidence presented to it, and the foregoing findings of fact and conclusions of law, that the Board of Adjustment does hereby GRANT the Relief Requested as noted above, subject to the following:

1. The Applicants are required to comply with the following conditions:
 - a. The Applicants shall comply with the Applicants' representations to, and agreements with, the Board during the hearing on this Application;
 - b. The Applicants shall comply with the comments and requirements in the Board Engineer's report dated October 3, 2021 and the Board Planner's report dated October 4, 2021, including, but not limited to:
 - The Applicants shall comply with the requirements of the Stormwater Management section (§ 146) of the Land Use Ordinance;
 - The Applicants shall perform percolation/permeability testing in the vicinity of the proposed drywell/infiltration/recharge system proposed. The Applicants shall also locate the seasonal high ground water table to ensure a minimum separation of two (2) feet between the bottom of the

infiltration system and the ground water table. The Board Engineer and/or Casey & Keller, Inc., shall be notified a minimum of 72 hours in advance of this testing so that a representative of either entity may be present. The engineer-of-record shall be present during percolation/permeability testing and shall submit a signed and sealed certification regarding the results of said testing. These tests may be performed after issuance of the requested Grading and Building Permits, but prior to the installation of the infiltration system(s). The engineer-of-record shall also provide calculations, utilizing the observed permeability rate, with a factor of safety of two (2), to demonstrate that the proposed recharge systems will completely empty within 72 hours. Should on-site testing yield undesirable percolation/permeability rates, the Applicants may be required to provide an alternative design which does not rely on percolation consistent with Section 146.2b.2 of the Ordinance, same to be subject to the further review of the Board Engineer;

- The Applicants shall investigate whether it is possible to relocate the drywell approximately 10 feet to the south and 7 feet to the west to minimize damage to the tree root systems of the perimeter trees that are to remain. The Applicants shall also investigate whether the temporary soil stockpile can be relocated closer to the rear of the dwelling for the same reason. Any revisions to the plans shall be subject to the review and approval of the Board Engineer;
 - The Applicants shall revise the architectural plans to include the measurements for height;
- c. The Applicants shall correct any discrepancies on the plans and shall resubmit said plans, to the satisfaction of the Board Engineer and Board Planner;
 - d. The Applicants shall ensure that the swimming pool and spa is constructed at least 10' away from the principal dwelling structure's foundation, to the satisfaction of the Board Engineer;
 - e. The Applicants shall ensure that the fence enclosing the swimming pool is at least 54" in height and otherwise complies with the pool fencing and gate requirements, to the satisfaction of the Board Engineer; and
 - f. The Applicants shall provide a landscape plan for landscaping around the perimeter of the swimming pool, to the satisfaction of the Board Engineer and Board Planner. The landscaping plan shall also include the additional three (3) evergreen trees proposed to screen the addition, which shall be planted at a planting height of 6 feet.

2. The grant of this Application shall not be construed to reduce, modify or eliminate any requirement of the Township of Long Hill, other Township Ordinances, or the requirements of any Township agency, board or authority, or the requirements and conditions previously imposed upon the Applicants in any approvals, as memorialized in resolutions adopted by the Township of Long

Hill Board of Adjustment or Planning Board except as specifically stated in this Resolution.

3. The Applicants shall comply with any prior conditions of approval to extend same would not be inconsistent with the approval granted herein.

4. The grant of this Application shall not be construed to reduce, modify or eliminate any requirement of the State of New Jersey Uniform Construction Code.

5. All fees and escrows assessed by the Township of Long Hill for this Application and the Hearing shall be paid prior to the signing of the plans by the municipal officers. Thereafter, the Applicants shall pay in full any and all taxes, fees, and any other sums owed to the Township before any certificate of occupancy shall issue for the Property.


6. In accordance with the adopted ordinance provisions and the current requirements of the Township of Long Hill, to the extent applicable, the Applicants shall be required to contribute to the Township's "Affordable Housing Trust Fund" and/or otherwise address the impact of the subject application for development upon the affordable housing obligations of the Township, in a manner deemed acceptable by the Township Committee and in accordance with COAH's "Third Round Substantive Rules" and/or in accordance with enacted legislation and/or in accordance with direction from the Courts.

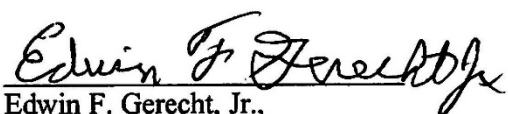
7. The approval herein memorialized shall not constitute, nor be construed to constitute, any approval, direct or indirect, of any aspect of the submitted plan or the improvements to be installed, which are subject to third-party jurisdiction and which require approvals by any third-party agencies. This Resolution of approval is specifically conditioned upon the Applicants' securing the approval and permits of all other agencies having jurisdiction over the proposed development. Further, the Applicant shall provide copies of all correspondence relating to the Application, reviews, approvals and permits between the Applicant and third-party agencies from which approval and permits are required to the Planning/Zoning Coordinator of the Township of Long Hill, or designee, or any committee or individual designated by ordinance or by the Board to coordinate Resolution compliance, at the same time as such correspondence is sent to, or received by, the Applicants.

WHEREAS, a Motion was made by Mr. Grosskopf and seconded by Mr. Rosenberg to GRANT approval of the Relief Requested as set forth herein.

BE IT FURTHER RESOLVED, that this Resolution, adopted on October 19, 2021, memorializes the action of the Board of Adjustment taken on the Hearing Date with the following vote: Yes: Grosskopf, Rosenberg, Aroneo, Malloy, Hain, Johnson and Gerecht; No: None; Recused: None; Not Eligible: None; Absent: Gianakis, Robertson.


ATTEST:


Debra Coonce,
Board Secretary


Edwin F. Gerecht, Jr.,
Chairman

VOTE ON RESOLUTION					
MEMBER	YES	NO	NOT ELIGIBLE	ABSTAINED	ABSENT
CHAIRMAN GERECHT	X				
VICE CHAIRMAN JOHNSON	M				
ARONEO					X
GIANAKIS			X		
GROSSKOPF	2nd				
MALLOY	X				
ROSENBERG					X
HAIN – ALT 1	X				
ROBERTSON – ALT 2			X		

I hereby certify this to be a true copy of the Resolution adopted on October 19, 2021.


 Debra Coonce,
 Board Secretary

STATE OF NEW JERSEY
MORRIS COUNTY

SS.

I, Debra Coonce, being of full
age, being duly sworn upon her oath, certifies:
that a notice of which the annexed is a true copy, was
published in the Echoes Sentinel which is a newspaper
published in Morris County, New Jersey,
on the 28th day of October, 2021
in said newspaper.



Sworn and subscribed before me this

28th day of OCTOBER, 2021



Notary Public of New Jersey

