



TOWN OF YARMOUTH  
BOARD OF APPEALS  
DECISION

**FILED WITH TOWN CLERK:**      **October 21, 2015**

**PETITION NO:**                      **#4615**

**HEARING DATE:**                      **October 8, 2015**

**PETITIONER:**                      **Brian M. O'Hearn and Trisha Lee O'Hearn**

**PROPERTY:**                      **31 Flintlock Way, Yarmouth Port, MA**  
**Map & Lot#: 0122. 17; Zoning District: R-40**  
**Book/Page: 25199/138**

**MEMBERS PRESENT AND VOTING: Chairman Steven DeYoung, Sean Igoe, Debra Martin, and Bryant Palmer.**

Notice of the hearing has been given by sending notice thereof to the Petitioner and all those owners of property as required by law, and to the public by posting notice of the hearing and publishing in *The Register*, the hearing opened and held on the date stated above.

The Petitioner seeks a Variance pursuant to Zoning Bylaw §102.2.2 and §203.5 to allow for the installation of an in-ground swimming pool which will encroach into one side yard setback, as accessory to a single-family dwelling in the R-40 Zoning District.

The property contains approximately 15,246 square feet of area, and is currently improved with a two-story single family structure having 3 bedrooms and 2 baths, with an attached garage, and constructed in approximately 1964. The garage portion of the existing dwelling sits approximately 7 feet from the northerly boundary, resulting in an encroachment into that setback by approximately 13 feet. The structure complies with all other setbacks and bulk requirements of the current Zoning Bylaw.

The Petitioner proposes to install a 16 foot by 32 foot in-ground swimming pool in the southerly side of the back yard. The Site Plan prepared by Down Cape Engineering, Inc., dated October 1, 2015, which is incorporated by reference into this Decision, shows the current location of the Title 5 septic system in the back yard. Daniel Ojala testified that the septic system's position was based on the existence of clay in the soil on this lot and, for this reason, the septic system was required to be installed in this location. The swimming pool is proposed to be located 5 feet from the septic system's distribution box, with Board of Health approval, and will encroach into the southerly side setback by approximately 4 feet.

The direct abutters to the south did speak regarding their initial opposition to the proposal, but their recognition of the compromise the Petitioners were willing to make to add certain conditions to any relief granted, which would ameliorate any privacy and noise concerns. The Board appreciated these accommodations for the sake of neighborhood harmony.

The Board analyzed the Variance criteria from Zoning Bylaw §102.2.2, which permits the Board to issue a Variance if it finds all of the following:

1. Literal enforcement of the provisions of this bylaw would involve a substantial hardship, financial or otherwise, to the Petitioner or appellant.
2. The hardship is owing to circumstances relating to the soil conditions, shape or topography of such land or structures and especially affecting such land or structures, but not affecting generally the zoning district in which it is located.
3. Desirable relief may be granted without either: substantial detriment to the public good; or nullifying or substantially derogating from the intent or purpose of this bylaw.

The Board found that the proposal met these requirements, and that a Variance should be issued. The Petitioner has established a hardship, in their inability to the use and enjoyment of their property to the fullest extent. Specifically, the Board noted that other types of recreational uses could be made of any portion of the property without regulation, including the installation of a brick patio with chairs and tables, grills, or even the placement of a hot tub in the same location as the proposed swimming pool. Second, the Board found that the existence of a pocket of clay in certain locations on this property resulted in the septic needing to go in its present location, and pushing all other uses to the south part of the property. Having no other reasonable place to locate the pool, the Petitioners were obligated to site it where proposed. The hardship arises from the soil conditions. Finally, the Board found that desirable relief may be granted without either substantial detriment to the public good or nullifying or substantially derogating from the intent or purpose of this bylaw. Specifically, there will be no substantial detriment to the public good with the installation of a swimming pool located 16 feet from a sideline. The Petitioner maintains an approximate 12 foot hedge between their property and the neighbor's property, providing valuable screening. The use of the back yard for typical recreational purposes are allowed in conjunction with the residential use.

Accordingly, a Motion was made by Ms. Martin, seconded by Mr. Igoe, to grant the Variance as requested by the Petition, with the following conditions, to which the Board voted unanimously to grant:

1. The Petitioners, when installing the required pool fencing, will utilize a fence of materials and height which the Old Kings Highway Regional Historic District will permit, for that portion of the lot from the rear corner of the Petitioner's house to the southeast corner of the lot behind the existing shed;
2. The Petitioners will plant vegetation on the southerly side of the fence referenced above, facing the southerly abutters' property, using mutually agreeable plantings; and

3. Petitioners will ensure that any lighting installed will not shine directly into abutting properties, but will be contained on their property.

No permit shall issue until 20 days from the filing of this decision with the Town Clerk. Appeals from this decision shall be made pursuant to MGL c40A section 17 and must be filed within 20 days after filing of this notice/decision with the Town Clerk. Unless otherwise provided herein, a Variance shall lapse if the rights authorized herein are not excised within 12 months. (See MGL c40A §10)

---

Steven DeYoung, Chairman