



TOWN OF YARMOUTH  
BOARD OF APPEALS  
DECISION

**FILED WITH TOWN CLERK:** May 31, 2018

**PETITION NO:** 4747

**HEARING DATE:** May 24, 2018

**PETITIONER:** Luis Daniel Xavier

**PROPERTY:** 85 Old Hyannis Road, Yarmouth Port, MA  
Map & lot#: 0094.1.4; Zoning District: R-40 and B3  
Book & Page: 28056/249

**MEMBERS PRESENT AND VOTING:** Steven DeYoung, Chairman, Dick Martin, Thomas Nickinello, Tom Baron, and Susan Brita

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 §203.5, in order to permit an accessory structure to be located partially in the rear setback. The Property is located in the R-40 Zoning District, with a small portion of the rear of the lot being in the B3 Zoning District and is improved with a one story residential structure, containing 3 bedrooms and three baths, constructed in approximately 2002. The property is a so-called pork chop lot, which abuts the B3 Zoning District to the rear of the lot. In the spring of 2016, the applicant hired a company to construct an in-ground swimming pool, deck, spa, and patios in his backyard. The contractor applied for and was issued a Building Permit (Permit No. BLDPS-16-006383) based on a plan submitted with the application. The plan showed the pool being situated more than 20 feet from the rear lot line, in accordance with §203.5 of the Zoning Bylaw. Construction commenced, and included a series of stone retaining walls due to the elevated lot to the rear. In the fall of 2017, upon learning that the building permit was still active, Mr. Xavier contracted Down Cape Engineering to commence an as-built plan to be submitted to the Building Department. It was at this time that he learned that the pool had not been constructed according to the original plan, but instead was located 13 feet from the rear lot line, as was a portion of the spa and deck. He then applied to the Zoning Board of Appeals for the current relief requested. Testimony was provided that the cost of the construction of the pool, deck, spa and retaining walls was in excess of \$100,000.00. The rock retaining walls were constructed, partially, with stones excavated during the pool installation. The contractor who installed the pool is no longer located on Cape Cod.

The relief sought was to permit the existing configuration of the swimming pool, decks, patios and spa to remain as presently existing. No abutters or other interested parties appeared either in opposition or in favor of the petition.

§102.2.2 of the Yarmouth Zoning Bylaw permits the Board to hear and decide appeals or petitions for Variances from the terms of this bylaw, including Variances for use, with respect to particular land or structures. Such Variance shall be granted only in cases where the Board of Appeals 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 was satisfied that the applicant, if denied this request, would suffer a hardship, both financially and regarding the reasonable use of his property. A swimming pool is accessory to the primary use of the property – in this case a residential use in a residential zoning district. A forced removal of the existing pool and other improvements would result in a financial hardship.

The Board then heard testimony that the petitioner's hardship arises as a result of the shape, soil or topography of the lot. In this case, the topography of the lot played a role in the pool's present location. There was a 15 foot slope on the northwest boundary and at least a 10 foot drop along the entire back of the property to the pool deck. Enormous rocks have been used to create a revetment of sorts to prevent the abutting lot in the rear from falling into the pool. The pool is currently located very close to the existing deck, but even in its present configuration, is still very close, especially with small children using the back yard. When the excavation of the yard took place, the wall was built on the lot line, creating a bowl of sorts, which put the pool well below surface, out of view, and would make the side yard easier to use if located where it is.

Finally, the Board determined that desirable relief could be granted without either substantial detriment to the public good or nullifying or substantially derogating from the intent or purpose of this bylaw. In this case, there will be no substantial detriment to the public good with the installation of a swimming pool located 13 feet from a rear lot line. The significant topographical drop off creates a private area, hidden by rock walls and vegetation. This will prevent noise from reaching other abutting residential neighbors, and which will not disturb the abutting business zone. The use of the back yard for typical recreational purposes is allowed in conjunction with the residential use. A swimming pool is not going to change the degree of use of the backyard – just the kind of use. The bylaw is concerned, especially in residential districts, about noise, congestion, nuisance, hazard and the like. But here, relief which permits the swimming pool to remain as constructed will not cause such results, and will not nullify or substantially derogate from the intent or purpose of the bylaw.

Finally, this situation is not self-created, as the pool was intended to be located elsewhere, a building permit was pulled, and the Petitioner trusted the contractor to do his job correctly.

Accordingly, a Motion was made by Mr. Nickinello, seconded by Mr. Baron, to grant the Variance, as requested, without conditions. The members voted unanimously in favor of the Motion.

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)

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Steven DeYoung, Chairman