BEFORE THE DEWEY BEACH BOARD OF ADJUSTMENT

101 CAROLINA LLC TMP # 334-20.10-89.01	:	
	:	Application: 9915
Appellant,	:	
v.	:	
TOWN OF DEWEY BEACH	:	
Appellee.	:	

SUMMARY OF APPELLEE'S ARGUMENT

HUDSON JONES JAYWORK & FISHER
Fred Townsend, Esquire (Bar No. 2925)
309 Rehoboth Avenue
Rehoboth Beach, DE 19971
(302) 227-9441
ftownsend@delawarelaw.com

DATED: APRIL 24, 2026

Summarized below is the Town's argument in the appeal from a denial of an accessory swimming pool building permit. The hearing is scheduled to be heard by the Board of Adjustment on April 30, 2026. Naturally the Town requests that the Board affirm its decision to deny the permit for failure to comply with multiple zoning code restrictions applicable to the height of the proposed fence.

The Appellant is 101 Carolina LLC, the owner of 101 Carolina Street, Dewey Beach – a standard sized lot in the Neighborhood Residential ("NR") District (hereafter "the Property"). The NR district is subject to an 18ft front yard setback, sometimes referred to in the code as the *front yard* or the *required front yard.*

The Appellant recently demolished a preexisting home on the Property and obtained a building permit to build a new dwelling there. As a separate phase of the redevelopment project, the Appellant applied for a permit to install an accessory swimming pool behind the front yard setback in front of the home and surround it with the required 3ft walk space and 4.5ft tall pool safety fence.

While the proposed pool location was code compliant, the proposed location of the required minimum 4.5ft safter fence violated the zoning code in two respects causing the Town to deny the accessory swimming pool permit.

No fence taller than 3.5ft is permitted in a required front yard in the NR district

Section 185-51.A. and 92.B.2. of zoning code limit fence heights in a parcel's required front yard setback area to 3.5ft.[1] The minimum required front yard setback area is 18ft in the NR zoning district.[2] Consequently no fence may exceed 3.5ft within 18ft of the front boundary.

The Appellant's proposal would be code compliant so long as the pool, the required 3ft walk space and the minimum 4.5ft pool safety fence were all located behind the 18ft setback. By way of example refer to Exhibit 2, images of a recently approved swimming pool and safety fence.[3]

Instead, however, Appellant desires to locate its pool safety fence well inside the 18ft required front yard setback area.[4] For this reason the Town was compelled to deny the accessory swimming pool permit. Other than exceptions for commercial screening (not permitted in NR) and tennis court fences the 3.5ft height limitations governs in the required front yard.

---

[1] Exhibit 1A and B. §185-51.A. and B. and 92

[2] Table 2 of the Dewey Beach Zoning Code, enacted by reference per §185-23G.

[3] Exhibit 2. Photos of pool fence behind front yard set back

[4] Exhibit 3. Survey prepared by Solutions Integrated Planning & Management LLC

The Green Space Ordinance prohibits accessory swimming pools in required front yards

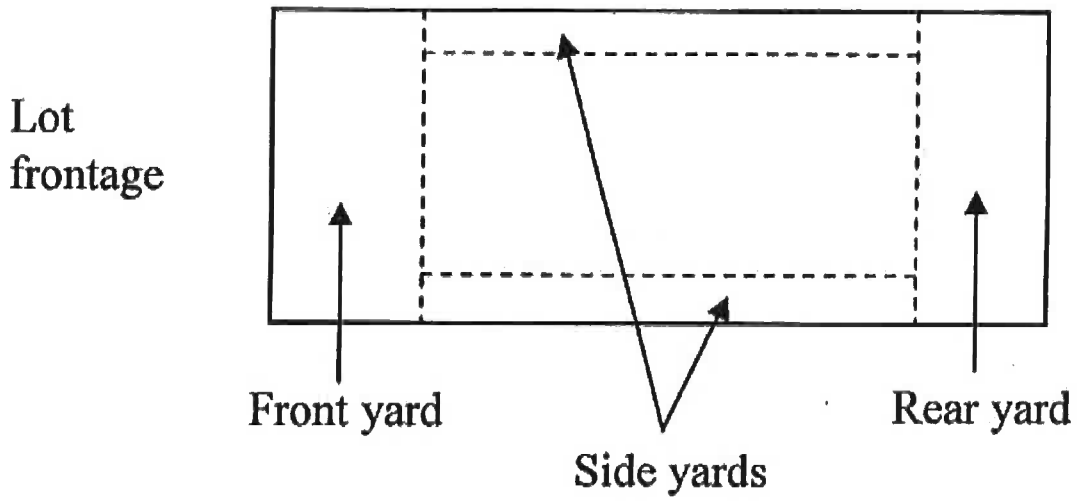
Appellant fashions its claim of right to exceed the fence height limitation by arguing (1) that accessory swimming pools are permitted in the required front yard and (2) accessory swimming pools are required to be surrounded with a minimum 4.5ft fence and 3ft walk space then (3) swimming pool fence heights must not be subject to the 3.5ft height restriction. But, for multiple reasons, Appellant's initial contention fails to withstand scrutiny. Accessory swimming pools are prohibited in required front yards.

On September 20, 2024, Town Council enacted Ordinance No. 843 ("the Green Space Ordinance") that dictates in pertinent part:

> *"All front yard area shall be green space except for one 20x18 driveway or two 10x18 driveway spaces and one 4x18 space for a walkway."*[5]

To apply this ordinance, we first examine the meaning of the word "yard" expressed in Chapter 1-16 of the zoning code. The definition's embedded diagram defines the front yard with a depiction of the area along the lot's frontage that varies in depth by zoning district.

> ***YARD***
> *The area extending between the lot lines and respective building setback lines on a lot or parcel.* To avoid confusion: any portion of a yard that lies both in the front yard and a side yard shall meet any and all front yard requirements; any portion that lies in both the rear yard and a side yard, the rear yard requirements.



Taken together the 18ft deep required front yard in the NR district may be improved only with one 20ft or two 10ft driveways and a 4ft wide walk way, period. There is simply no right to a pool in the front yard setback.

---

[5] Exhibit 4. Ordinance No. 843

Appellant's sole basis for contending that pool safety fences are permitted in a required front yard is based on a faulty interpretation of §185-51B, that swimming pools *are* permitted there (even if no part of the pool is in the required front yard). And, according to Appellant's logic, if swimming pool is permitted there, so is its required safety fence.

In clear and certain terms, the 2024 Green Space ordinance prohibits any interpretation of the code allowing for accessory swimming pools in the required front yard. Table 2, as amended cannot be reconciled with Appellant's position that pools are permitted in the required front yard. Therefore, any contrary interpretation of §185-51.B. must give way to the precise restrictions of set forth in Table 2.

Appellant's interpretation of the Code yields inconsistent and absurd results.

Although it is unnecessary to further examine the claim that pools are permitted in required front yards, Appellant's position also fails to withstand the test of statutory construction – rules designed to ascertain and give effect to the intent of the legislators as expressed in the statute if its plain meaning is uncertain. The rules first require us to determine whether the statute is ambiguous or reasonably susceptible to different interpretations. The question here for this Board is whether Appellant's reading of the §185-51.B. is reasonable.

The codification of §185-51 sheds light on this question. The provisions of §185-51.B. were originally adopted in 1982 in the form of Ordinance 14, section 8.4.[6] When the ordinance was subsequently codified into our "code book" by the adoption of Ordinance 684, it was apparently transcribed verbatim with the single omission of the word "rear" depicted in brackets below:

> *Accessory swimming pools, open and unenclosed, may occupy a required **[rear]** yard or side yard, provided they are not located closer than 10 feet to an interior side lot line or six feet to a rear lot line....*

The presence of the word "rear' effectively precludes any argument that swimming pools are permitted in a required front yard. With the key word "rear" present, the ordinance cannot be interpreted to authorize anything in the required front yard. The ordinance makes no specific reference to front yards at all. Other than an error of the transcriber, there appears to be no other reasonable explanation for why the word went absent from §185-51B -- certainly not one related to public policy favoring pools in the front yards.

To correct the perceived error, Council adopted Ordinance 875-2026.[7] A good faith investigation of the minutes and ordinances predating Ordinance 684 revealed no indication that section 8.4 was previously amended in any way, let alone by striking the word "rear".

---

[6] Exhibit 5. Ordinance No. 14, excerpted

[7] Exhibit 6. Ordinance 875-2026

Here, we finally turn to how Appellant reaches the conclusion that swimming pools are permitted in required front yards -- by ignoring all but the highlighted portions subsection 51.B.:

> ***Accessory swimming pools**, open and unenclosed, **may occupy a required yard** or side yard, provided they are not located closer than 10 feet to an interior side lot line or six feet to a rear lot line....*

Statutes must be construed as a whole and in a way that gives effect to all of their provisions and avoids absurd results. If possible, arguably conflicting provisions should be harmonized. Appellant's interpretation that pool safety fences are not restricted in height leaves §185-51.B. in conflict with §185-51A and §185-92.B.2 and thereby violates this test of statutory construction. It fails to harmonize or explain the meaning of the clause "or side yard" that appears in the same sentence and otherwise fails to give meaning to the remaining provisions.

Appellant's reading leads to absurd results, such as restricting a swimming pool's proximity to the side and rear boundary lines but not to its front boundary. This reading defies the purpose of section – giving neighbors some buffer and protection against related noise. Appellant's interpretation would have you believe that front yard pools are encouraged by the code.

It also requires the conclusion that safety fences are exempt from fence height restrictions that ensure site lines along public streets. Remember the height of pool safety fences is expressed in the code in terms of a minimum 4.5ft, not a maximum. Accepting Appellant's reading requires the Board to conclude that existing fence height restrictions applicable to fences in the all yards do not apply to fences that surround pools. This is one of many absurd results that must be avoided.

Next, as expressed in its December 5, 2025 letter, the Appellant invokes a rule of statutory construction that an ambiguous code provision must be interpreted in the property owners' favor. Once again, the Green Space ordinance negates the argument that an ambiguity exists. Since accessory swimming pools cannot occupy the required front yard, there are no longer two competing interpretations to weigh against one another. The only prevailing code standards dictate that fences in the front yard are limited to 3.5ft pursuant to §185-51 and §185-92.

The final argument presented in Appellant's December 5, 2025 letter is that the Town should follow "precedent" set by the Commissioners in a 2013 hearing involving the interpretation of §185-51B in a different context. That context was a potential suspension of a rental license that followed the installation of a swimming pool in a manner contrary to the approved building permit for the property at 114 Chesapeake Street. The owner of 114 Chesapeake Street held a permit to install a compliant swimming pool, surrounding walk space

and a 4.5ft safety fence all behind the NR's 18ft setback.[8] Without obtaining an amended permit, the owner of 114 Chesapeake installed a larger pool with a leading edge approximately 3ft closer to the Chesapeake Street.[9] This act pushed the pool safety fence 3ft into the required front yard setback.

Following a hearing, Council voted to reverse the Town Manager's sanction, not because he misinterpreted the code, but on the basis of ambiguity. See Appellant's Exhibit "3D" pages 16-17 and Appellee's Exhibit "9" pages 3 and 4.

Council's finding of ambiguity is legally significant here because property owners with prior knowledge of an ambiguity are not entitled to a favorable reading of the code.[10] Generally speaking a property owner is entitled to rely on the state of law at the time he or she seeks a building permit, or even before that if certain elements are met. However, when the property owner knows of an ambiguity, it has no knowledge of the state of the law upon which to rely. The Supreme Court in *Ocean Bay Mart v. the City of Rehoboth Beach* stated the following:

> *"..., a property owner who relies upon an ambiguous zoning provision does so at the property owner's peril. Where uncertainty exists regarding the meaning and application of a zoning provision, no reliance on provision can be considered reasonable until after the uncertainty is resolved."*[11]

Appellant cannot deny the outcome of the 2013 hearing. The 2013 dispositive motion held that ambiguity was the basis for their ruling.

Moreover, and at the risk of redundancy, the events of 2013 are rendered moot by the adoption of the Green Space Ordinance and the clarifying provisions of Ordinance No. 875-2026. As of September 20, 2024, there is no ambiguity to exploit. Swimming pools are not permitted in required front yards and therefore neither are pool safety fences.

As members of the Board of Adjustment you are essentially authorized to substitute your judgment for that of Building Official. See generally §185-66. In the course of doing so, you are not obligated to follow Council's 2013 finding of ambiguity. There is no explicit requirement that Boards of Adjustment follow their own precedent in the same manner as courts are bound to do. Consider also that the so-called precedent was not a decision of a prior Board of Adjustment exercising its jurisdiction to interpret the zoning code.

---

[8] See Appellant's Exhibit 3B at p.2 of the Primos, Esq. letter

[9] Exhibit 7. Foresight survey of 114 Chesapeake Street dated September 25, 2013 and permit survey submission Element surveyors

[10] *Ocean Bay Mart, Inc. v. City of Rehoboth Beach*, 285 A.3d 125, 2022 Del. LEXIS 297

[11] Id. at p. 140-141

The relatively brief indication that the permit would be approved does not confer a right to an illegal permit

Lastly, it is anticipated that Appellant will rely heavily upon an indication following the pool permit denial in which the Town indicated the permit would be granted. After denying the pool permit the Town received continuing requests for reconsideration from Appellant. The December 5, 2025 letter from Attorney Spence was an explicit acknowledgement of a denial of the permit and request for reconsideration.[12] Repeated requests by Appellant followed. On December 22, 2025, the Town Manager indicated verbally that the Town's position has changed and the permit would be approved. He will testify as to his reasoning. But on January 14, 2026 (24 days later), the Town Manager indicated that the permit would not be issued due to the height of pool safety fence.

From a legal perspective, the rescission of the verbal approval is not significant. Consider that even the issuance of a building permit does not protect a project from later enforcement of the zoning code. Vested rights require more than issuance of the permit itself. *City of Rehoboth Beach v. Shirl Ann Assoc.*, 1993 Del Ch. Lexis 225. *Council of South Bethany v. Sandpiper Dev. Corp.* 1986 Del.Ch. Lexis 457. And in this instance the permit was never even issued.

The prevailing law concerning vested rights and collateral estoppel require demonstration of a substantial change of position. The elements of the test include the making of expensive and permanent improvements in reliance on the permit. *Miller v. Board of Adjustment of Dewey Beach*, Del Super., 521 A2d 642, 645 (1986). Significant financial losses must be shown. Moreover, a Board of Adjustment has jurisdiction to review interpretations of the zoning code and to grant relief from its strict enforcement. This Board is simply not authorized to go beyond its jurisdictional boundaries to order equitable relief or find that a right to a permit has vested. See generally, *City of Lewes v. Nepa*, 212 A3d 270, 2019 Del. Lexis 293.

Finally, it is the property owner's legal obligation to propose code compliant building permit applications. This concept is reflected in the 2021 International Building Code, adopted by reference to the Sussex County Code. It indicates that a noncompliant building permit does not excuse the consequences of noncompliance.[13] A fence of 4.5ft in the required front yard is not code compliant. It violates two separate code restrictions limiting fences to 3.5ft in the required front yard.

For the above reasons, it is requested of the Board that the appeal be denied and the decision to withhold issuance of an illegal permit be affirmed.

---

[12] Exhibit 8. Appellants 12/5/25 excerpted letter to the Town

[13] Exhibit 10. 2021 International Building Code (IBC) section 105.4 (reproduced).