

APPLICANT’S PRE-HEARING SUBMISSION
BOA HEARING – 101 CAROLINA

BACKGROUND

The Applicant, 101 Carolina LLC (the “Applicant”) holds a long-term leasehold interest 101 Carolina Street (the “Property”) in the Town of Dewey Beach. The Applicant is constructing a home on the Property. The Applicant applied to the Town of Dewey Beach (the “Town”) for a construction permit to construct a pool (the “Pool Permit”) on the Property as an accessory use to the home.

At the upcoming Board of Adjustment (“BOA”) hearing, the Applicant will present testimony and exhibits to establish facts as summarized hereafter. The Pool Permit was filed after the Applicant and her builder met with Town officials multiple times. Thereafter, the Applicant engaged a lawyer to outline why the Town ordinance permitted pool safety fences in the front yard setback. The Applicant was verbally advised by the Town Manager and The Assistant Town Manager that the Pool Permit would be granted. Thereafter, the Town referred the application to the Sussex County Building Department for a Sussex County building permit for review of the pool’s compliance with building code standards. A Sussex County building permit was issued for the pool. After complaints from local residents regarding the Pool Permit, the Town advised the Applicant that it was not granting the Pool Permit despite its referral to Sussex County and its prior verbal representation that the Pool Permit would be granted. The Town issued a letter dated January 16, 2026 (the “Denial Letter”), denying the Pool Permit due to “noncompliance with §185-51(A) and §185-92(A)(2) restricting fence heights to 3.5 feet in a required front yard” (the “Denial”).

The Applicant comes before the Dewey Beach Board of Adjustment seeking relief on two grounds:

- 1) Appeal from the Decision of a Building Official Pursuant to §185-66 of the Dewey Code. The Applicant appeals the denial of the Pool Permit by the Town Building Official.
- 2) Application of Special Yard Exception Pursuant to §185-67. The Applicant seeks a special yard exception to allow for a 4.5 foot safety fence 8 feet into the front yard setback (i.e., 10 feet from the Property’s front property line).

APPLICABLE LAW

1) Appeal of the Building Official’s Denial of the Pool Permit.

The Applicant’s BOA Application establishes that the Applicant appeals the Denial of the Pool Permit for the following reasons:

- A) The grounds for denial are not supported by the language of the Town Code.
- B) The grounds for denial are not supported by past precedent.
- C) The Town building official had already evaluated and determined that the 4.5 foot safety fence proposed by the Pool Permits permitted under the Town Code. The Denial Letter was an arbitrary and capricious retraction of both a verbal and a de facto approval by the Town Building official in violation of established Town procedure and precedent and in violation of the Building Official's express and sole authority to render decisions on building permit applications.

STANDARD OF REVIEW

Because the BOA sits in a quasi-judicial capacity, it is, respectfully, bound to the same applicable legal standard as a Delaware court. Accordingly, the BOA must first determine whether the specific provision of the Town Code that governs the placement of a safety fence surrounding a pool is ambiguous, because if it is not, then the plain meaning of the statutory language controls.¹ The mere fact that the parties here disagree about the meaning of the Code provision does not create ambiguity.² Rather, an ambiguity arises *only* if the code provision can be read more than one way and *both* readings are reasonable.³ If the BOA finds the meaning of §185-51(B) is ambiguous in the context of the Code, it is well settled under Delaware law that any ambiguity or uncertainty that arises in a zoning provision *must be decided in favor of the property owner*.⁴

A. The grounds for the Denial are not supported by the language of the Code.

In its Denial Letter, the Town asserts that the Applicant's Pool Permit is denied due to noncompliance with §185-51(A) and §185-92(A)(2) of the Dewey Code. The Denial Letter gives no apparent effect to §185-51(B) and does not remotely explain how §185-51(A) and §185-92(A)(2) override or jibe with the plain reading of §185-51(B).

Section 185-51 of the Dewey Code establishes supplementary height, area, and bulk requirements for accessory buildings and structures on lots. An "Accessory Structure" is defined by §1-16 of the Code as "[a] structure on the same lot with, and of a nature customarily incidental and subordinate to the principal structure."⁵

Section 185-51(B) governs the placement of accessory pools and fences on lots. It *permits* an accessory swimming pool to "occupy a required yard" and it *requires* two additional minimum elements: a 3 foot "walk space" and a 4.5 foot "safety fence."

¹ See *Chase Alexa, LLC v. Kent Cnty. Levy Ct.*, 991 A.2d 1148, 1151 (Del. 2010).

² See *id.* (internal citation omitted).

³ See *id.* (internal citation omitted).

⁴ See, e.g., *Dewey Beach Enter., Inc. v. Bd. of Adjustment of the Town of Dewey Beach*, 1 A.3d 305, 310 (Del. 2010).

⁵ See Dewey Beach Code Section 1-16 definition of "Accessory Structure."

The Town Code at §1-16 defines the words “yard” and “setback” nearly identically:

YARD: The area extending between the lot lines, and the respective building set back line on a lot or parcel.

SETBACK: An area extending from the lot lines to the building setback lines

The Code does not define the term “required yard” as used in §185-51(B). Yet, it follows that a “required yard” is the same thing as a yard as defined by §1-16 of the Code. The Property at issue is in an NR District and the required front yard setback for a lot in the NR District is 18 feet. Thus, the yard or required yard for this Property is the 18 foot deep area of the Property that is between the front lot line and the front yard setback line or building setback line.⁶

The Applicant’s proposed pool, and much of the required 3 foot walkway and fence surrounding the pool, is proposed to be built in the “buildable area” of the Property and not within the 18 foot front yard or setback (a/k/a the “front yard setback”).⁷ The Town has denied the Pool Permit on the basis that the a portion of the Applicant’s 4.5 foot safety fence required under §185-51(B) will sit approximately 7 feet 4 inches into the front yard.

The Town’s position—that the Applicant’s proposed 4.5 foot pool safety fence violates §185-51(A) and §185-92(A)(2)—does not pass muster under the rules of statutory construction for multiple reasons.

First, the Town’s position fails to give any credence to the plain reading of §185-51(B). Section 185-51(B) reads:

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. A walk space at least three feet wide shall be provided between pool walls and protective fences or barrier walls. Every swimming pool shall be protected by a safety fence or barrier at least 4.5 feet in height and constructed of concrete, stockade wood or material of equal quality.

Basic principles of statutory construction demand that a plain reading of a provision control, unless there is ambiguity that reasonably proffers at least two different, reasonable interpretations.⁸

⁶ See *id.* Definition of “SETBACK LINE or BUILDING SETBACK LINE:” “A line parallel to the front or street line and distant from it the least minimum depth of a required front yard”

⁷ See *id.* Definition of Buildable Area: “Depending on usage: that part of a lot not included with the yards or opens spaces required by the Town Zoning Code or the square footage of the aforementioned area.”

⁸ See, e.g., *Doroshov, Pasquale, Krawitz & Bhaya v. Nanticoke Mem’l Hosp., Inc.*, 36 A.3d 336, 342-43 (Del. 2012).

Section §185-51(B) expressly permits a swimming pool to be built in, or to “occupy” a required yard which by definition includes a front yard or front yard setback.⁹ If this section, which expressly addresses accessory pools, permits a pool to be in the front yard setback, it necessarily follows that other required elements under the Code section are permitted in the front setback as well. However, the Town’s Denial Letter gives no credence to the plain statutory language of Section §185-51(B) that expressly permits a swimming pool to “occupy” the front setback (“the required yard”) because it wholly ignores that any pool in the required front yard is also required to have a *code-required* safety fence or barrier protecting a swimming pool that is permissibly within the front setback. In short, if a pool is permitted in the front yard and it is required to have (i) a 3 foot wide walk space between pool walls and protective fences or barrier walls, and (ii) a 4.5 foot safety fence or barrier, it must follow that the walk space and barrier are also permitted in the front yard setback.

Second, the Town’s position that §185-51(A) precludes a 4.5 foot pool safety fence required under §185-51(B) violates the statutory interpretation principle that specific provisions of a statute should prevail over general provisions.¹⁰ The Denial Letter states that the Applicant’s Pool Permit violates §185-51(A) of the Town Code but does not explain how that section trumps or squares with the clear reading of §185-51(B). The two sections read:

§185-51 Accessory buildings and structures.

A. A hedge, fence or wall not more than 3.5 feet in height may project into or enclose any required front or side yard to a depth from the street line equal to the required depth of the front yard. Any fence, hedge, or wall for residential use may project into or enclose other required yards, provided such fences, hedges, and walls do not exceed a height of seven feet. This height limit does not apply to fences or walls used for commercial screening or tennis courts.

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. A walk space at least three feet wide shall be provided between pool walls and protective fences or barrier walls. Every swimming pool shall be protected by a safety fence

⁹ Comments by the Town Solicitor and Town Clerk at recent public town meetings suggest that the Town may argue that §185-51(B) was not intended to read to allow pools in a required yard and thereby a front yard. If the Town raises this issue the Applicant reserves the right to address with legal authority in rebuttal at the hearing.

¹⁰ See *A.W. Fin. Serv., S.A. v. Empire Res., Inc.*, 981 A.2d 1114, 1131 (Del. 2009) (describing and relying upon the statutory interpretation principle that "specific provisions should prevail over general provisions."); *Shellburne Civic Ass'n, Inc. v. Brandywine Sch. Dist.*, 2006 WL 4782500, at *4 (Del. Ch. Sep. 1, 2006) (highlighting that "[i]t is an often cited canon of interpretation that in construing statutes, specific provisions should prevail over general provisions.") (internal citations omitted).

or barrier at least 4.5 feet in height and constructed of concrete, stockade wood or material of equal quality.¹¹

Section 185-51(B) is specific to pools and the required safety fences or barriers around pools. The legislative intent to differentiate between pool safety fences and general hedges, fences, or walls in the front yard is evidenced by the fact that §185-51(B) recognizes that, due to the safety concerns attributable to pools, pool safety fences or barriers should be required to be higher than general hedges, fences, or walls for ornamental or pet containment purposes and be constructed of concrete, stockade wood, or material of equal quality. The specific provisions of §185-51(B) applicable to pool safety fences or barriers prevails over the general hedge, fence, and wall restrictions in §185-51(A) because that section addresses hedges, fences, and walls in general but not safety fences or barriers specifically, which is clearly a separate type of permitted accessory structure.

Third, the Town's position that §185-51(A) precludes the location of the 4.5 foot pool safety fence required under §185-51(B) in the front yard violates the rules of statutory construction because it fails to consider §185-51 as a whole and in a way that gives effect to each provision while avoiding any absurd result.¹² Simply stated, the Town's interpretation requires the BOA to accept that the drafters of these Code provisions intended for the accessory use of permissible hedgerows or bushes in §185-51(A) to be the equivalent of or mean the same thing as a required pool safety fence made of concrete or wood in §185-51(B). The Town's apparent interpretation that §185-51(A) prevents a pool safety fence in the front yard fails to acknowledge that §185-51(A) and §185-51(B) by their plain language intend to create and distinguish between types of fences, walls, or barriers permitted in the front yard with different restrictions applying to each. Section 185-51(B) expressly states, "Every swimming pool shall be protected by a safety fence or barrier at least 4.5 feet in height and construction of concrete, stockade wood or material of equal quality." A pool safety fence or barrier is not intended to be the equivalent of a hedge, fence or wall in §185-51(A). In fact, §185-51(A) does not reference the term "barrier" and certainly does permit it to be constructed from bushes that comprise a hedge. In short, the §185-51(A) fence and the §185-51(B) pool safety fence or barrier are clearly intended to be different accessory structures that are *both* permissible in the front setback.¹³

For all of the foregoing reasons, §185-51(A) does not prohibit the Applicant's 4.5 foot pool safety fence in the front yard setback of the Property.

In addition, the Town's Denial Letter also asserts that the Applicant's Pool Permit is denied due to noncompliance with §185-92(A)(2) of the Dewey Code.

¹¹ Town of Dewey Beach Code § 185-51 (emphasis added).

¹² See *Chase Alexa, LLC* at 1152.

¹³ Even if the Council accepts that the conflicting provisions can be reasonably reconciled, it must be reconciled in a way that favors the landowner. See *supra* n.4.

Section 185-92 of the Code reads:

- A. Ornamental fences or walls may project into or enclose any yard provided:
- (1) No fence or wall shall exceed seven feet in height.
 - (2) No fence or wall exceeding 3 ½ feet in height shall project into or enclose any portion of the yard located with the front yard setback.

The Applicant maintains that its pool safety fence is Code compliant because it meets the requirements of §185-51(B) which specifically articulates the restrictions applicable to pool safety fences and barriers. Since the Town asserted noncompliance with §185-92(A)(2) as grounds for denial of the Pool Permit, the Town clearly interprets §185-92(A)(2) as overriding or providing context to the meaning of §185-51(B) that precludes 4.5 foot pool safety fences in the front yard. This interpretation is incorrect for several reasons.

First, §185-92 is located in Article XII of the Code entitled Design Guidelines. Section 185-51(B) governing pool safety fences and barriers is addressed in Article VII of the Code entitled Supplementary Height, Area and Bulk Regulations. Safety pool fences and barriers are not referenced in §185-92 at all. Moreover, §185-92(A) establishes design guidelines for “ornamental fences.” The Town appears to interpret the fence height restriction contained with §185-92(A)(2) as applying to all fences but Section A of the section clearly reflects that the term fence, as used in subsection A(1) and A(2), relates to the term “ornamental fence” contained in Section A. Section 185-51(B) specifically calls the fences or barriers required for pools as “protective” or “safety” reflecting that such fences are differentiated from “ornamental” fences.

The drafters of the Code specifically used different words to ascribe different meanings to each provision.

When interpreting statutory language, Delaware courts deploy well-established canons of statutory interpretation. One relevant canon is *ejusdem generis*, which “instructs that where general language follows an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned.”¹⁴

Courts, and by analogy, quasi-judicial bodies, must ascribe purpose to the use of statutory language where possible.¹⁵ Since the applicable Code sections refer to fences with different and specific terms, the BOA should ascribe purpose to such language and conclude that pool safety fences are not governed by §185-92(A)(2) as such section is clearly intended to govern only ornamental

¹⁴ *Agar v. Judy*, 151 A.3d 546, 473 (Del. Ch. Jan. 19, 2017) (internal citations omitted).

¹⁵ *See Chase Alexa, LLC* at 1152.

fences. For the foregoing reasons, §185-92(A) of the Code does not preclude the Applicant's proposed 4.5 foot safety fence in the front yard setback.

In summary, the Town's position that §185-51A and §185-92A(2) preclude a mandated 4.5 pool safety fence around a pool permitted in the front yard under §185-51B does not give effect to the plain meaning of §185-51B or §185-92A and does not construe §185-51B as a whole with §185-51A for the following reasons:

1) It ignores that pools which are permitted to be located in the front yard setback under §185-51B are mandated in that section to have a 4.5 feet safety fence or barrier which by its plain language then necessarily requires that such fences or barriers be permitted in the front yard setback.

2) It ignores the statutory interpretation principle that specific provisions prevail over general provisions.

3) It ignores that §185-51(B) clearly allows for a protective/safety fence or barrier as an additional accessory use incidental to a pool separate and distinct from a general hedge, fence or wall that are ornamental in nature or intended for pet containment and therefore fails to construe §185-51 as a whole.

4) It ignores that §185-92(A)(2) only applies to "ornamental" fences of the type clearly contemplated by §185-51(A) and not to 4.5 foot pool safety fences or barriers mandated by §185-51(B).

Section 185-51(B), plainly read, permits a swimming pool to "occupy" a front setback and requires a minimum 4.5 foot safety fence surrounding that pool. For that reason alone, the safety fence at issue here is code compliant. The Town's Denial is based upon its reading of an entirely different code provision - §185-51(A). That different interpretation does not create an ambiguity in §185-51(A)—the safety fence at issue here is still legal.

For the reasons set forth above, the Applicant believes its interpretation that §185-51(B) permits a 4.5 foot safety fence in the front yard is the only reasonable one. However, if the BOA concludes that the relevant ordinances are ambiguous and that the Town's interpretation that §185-51(B) or §185-92(A) prohibit a pool safety fence in the front yard is also another reasonable interpretation, then the BOA must accept the interpretation that favors the Applicant. Delaware law is clear that if a zoning code is ambiguous such that there are two or more reasonable interpretations of it, the interpretation that favors the landowner prevails.¹⁶

¹⁶ See *Jack Lingo Asset Mgmt., LLC v. Bd. of Adjust. of City of Rehoboth Beach*, 282 A.3d 29, 33-34 (Del. 2022) (reversing board of adjustment decision in favor of landowner) (citing *Dewey Beach Enter., Inc. v. Bd. of*

B. The grounds for the Denial are not supported by past precedent.

The Applicant is providing evidence that the Dewey Town Council already decided in 2013 that a pool safety fence in the required front yard did not violate the Code. The Council has not amended §185-51 since that 2013 determination. The issue of whether pool safety fences are allowed in the front yard setback was addressed by the Council relative to a pool and pool safety fence in the front yard of 114 Chesapeake Street. A neighbor complained to the Town about a pool safety fence being present in the required front yard. After the complaint, the Town suspended the business license of the owner of 114 Chesapeake Street (the “114 Owner”) precluding such owner from renting the property. The Town justified the suspension of the business license on the grounds that the lot’s pool safety fence constituted a front yard setback violation. The Town demanded that the 114 Owner correct the safety fence location to comply with the Town's interpretation of §185-51(A).

The 114 Owner appealed the suspension of its rental license based upon the alleged pool safety fence violation, and the appeal was heard by the Dewey Town Council, who presided over the hearing as a quasi-judicial board. To determine whether the suspension was appropriate, the Council had to decide one specific question: was the safety fence located in the required front yard a violation of the code. *See* Appellant's Pre-Hearing Submission; Town's Pre-Hearing Submission at Exhibits 3B and 3C. After considering the attorneys' detailed written arguments and hearing the parties' presentations, the Council ruled that the pool safety fence in the front yard setback did not violate the code. *See* Town Email at Exhibit 3D. (the “2013 Ruling”).

The Town should have followed this on point precedent of the 2013 Ruling and the BOA should recognize it in this appeal as *stare decisis*. The Town denied the Applicant's Pool Permit for the very same reason the Town revoked the rental permit of the 114 Owner in 2013. In each case the Town maintained that a pool safety fence in the front yard setback was a violation of §185-51A of the Code. The Dewey Town Council, in its capacity as a quasi-judicial body, determined in 2013 that a 4.5 feet pool safety fence in the front yard setback does not violate the provisions of the Town Code. Thus, the legislative body charged with enacting ordinances as codified in the Town Code (including §185-51) concluded that pool safety fences in the front yard set back did not violate the code. Thus, the Town’s interpretation of the Code to deny pool safety fences in the front yard setback is contrary to established past precedent of the Town’s own Council and the Town should have recognized the 2013 Ruling on the very issue under Delaware’s well-established doctrine of *stare decisis*.¹⁷

Adjustment of Town of Dewey Beach, 1 A.3d 305, 310 (Del. 2010) (holding “[T]o the extent that there is any doubt as to the correct interpretation, that doubt must be resolved in favor of the landowner.”).

¹⁷ *See Daniels v. State*, 48 A. 196, 198 (Del. 1901) (holding that “[t]he rule *stare decisis* seems to apply with peculiar force to decisions which have determined questions respecting questions of real property and vested rights,

Assuming, *arguendo*, that the 2013 Ruling is not fully binding here, it is equally if not more compelling that the Council has not amended the Code in twelve years to require a different result.¹⁸ The 2013 Ruling is at a minimum evidence of a prior interpretation of the Town Code relative to front yard pool safety fences. The ordinances in question have not been amended and thus the 2013 Ruling should stand as precedent in their interpretation.

C. The Town building official had already evaluated and determined that the 4.5' safety fence proposed by the Permit Application was permitted under the Town Code. The Denial Letter was an arbitrary and capricious retraction of both a verbal and a de facto approval by the Town Building official in violation of established Town procedure and precedent and in violation of the Building official's express and sole authority to render decisions on building permit applications.

The Applicant will present testimony and evidence that after multiple meetings with the Applicant, correspondence from the Applicant's legal, and consultation with its own legal counsel, the Town Manager and the Town Assistant Manager reviewed the Pool Permit presumably as acting building officials and verbally advised the Applicant that its Pool Permit was being granted. The Town referred the Applicant's Pool Permit to Sussex County for building code compliance review and Sussex County issued a building permit for the pool. See, Exhibits 6A-6D. The Town's procedure for issuance of building permits was set forth on the Town's website and a copy of the procedure is set forth on Exhibit 5.¹⁹ The procedure on the Town's website clearly states, "Once we review the plans in accordance with the Town's building and zoning codes we will give you paperwork for you to take to the county office along with your approved set of sealed plans." Thus, at the time the Town issued the referral letter to the Sussex County Building Permit office, the Town had already determined that the Applicant's plans complied with the Town's zoning code.

After complaints from local residents regarding the Pool Permit the Town advised the Applicant that it was not granting the Pool Permit despite its referral to Sussex County and its prior verbal representation that the Pool Permit would be granted. The Town issued the Denial Letter a letter denying the Pool Permit due to "noncompliance with §185-51A and §185-92A (2) restricting fence heights to 3.5 ft in a required front yard." The Denial was a revocation of a defacto grant of the permit as evidenced by the building permit protocol set forth on the Town's public website

and it embraces as well those matters of general commercial importance which tend to influence future business transactions."'). Relying on *Daniels*, the Delaware Supreme Court reversed the Superior Court's decision which affirmed the Board of Adjustment's decision that denied the appellants a building permit because it conflicted with the provisions of the Wilmington Zoning Ordinance, stating, "[t]he holding is one affecting local property rights in land, and under the rule of *stare decisis* it should be followed." *Application of Emmett S. Hickman Co.*, 108 A. 2d 667, 669, 674 (Del. 1954).

¹⁸ See *State v. Barnes*, 116 A.3d 883, 892 (Del. 2015) ("When the prior judicial interpretation was subject to being overturned by the operation of the legislative process and was not overturned, the justification for departing from *stare decisis* is even more tenuous.") (citation omitted); 82 *C.J.S. Statutes* § 466 ("A long-standing administrative construction of a statute is accorded great weight in the determination of legislative intent because the legislature is presumed to have acquiesced in that construction if it has not amended the statute.").

¹⁹ The procedure contained in Exhibit 5 now appears to be removed from the Town website.

establishing the process for building permits and the referral letter and the verbal approvals given by the Town Manager and Assistant Town Manager. The Applicant made application to the Sussex County Building Permit office in reliance upon the referral letter and the town's verbal approvals. Complaints from Town residents is not a legitimate basis for Town's revocation of its defacto grant of the Pool Permit. The Town's decision to revoke the defacto grant of the Pool Permit and its subsequent Denial was arbitrary and capricious because it was clearly driven by public outcry rather than Town's evaluation of the Code's meaning and past precedent in its interpretation.

2) The Applicant seeks a Special Yard Exception in accordance with §185-67(C)

Section 185-67(C) reads: Special yard exceptions may be granted by the Board of Adjustment to allow, in special circumstances, the installation of pergolas, gazebos, swimming pool auxiliary buildings and similar incidental structures in the yard setback area in any district but not closer than three feet to a property line.

That Applicant submits that a pool safety fence is a "similar incidental structure" that is entitled to a special yard exception.

The following definitions found at §1-16 of the Code are instructive in this analysis:

Structure: That which is built or constructed, including, without limitation because of enumeration, buildings for any occupancy or use whatsoever, fences, signs, billboards, fire escapes, chute escapes, railings, trailers or manufactured homes, swimming pools, backstops for tennis courts, pergolas, telecommunications equipment and enclosures, water tanks, towers, open-grade steps, sidewalks or stairways, tents or anything erected and framed to component parts which is fastened, anchored or rests on a permanent foundation or on the ground. For floodplain management purposes, a "structure or building" shall mean a walled and roofed building, including a gas or liquid storage tank, that is principally above ground, as well as a manufactured home.

Building: Any structure having a roof supported by columns or walls and used primarily for the housing or enclosure of persons or property of any kind.

Accessory Building: A subordinate building or a portion of the main building, the use of which is clearly incidental to or customarily found in connection with the main building or principal use of the land and, except as otherwise provided in this Code, located on the same lot or parcel as the main building or principal use of the land.

Accessory Structure: A structure on the same lot with, and of a nature customarily incidental and subordinate to, the principal structure.

Generally, an "exception" in zoning law is not the same as a variance. *See Application of Emmett S. Hickman Co.*, 108 A.2d 667 (1954). In the case of an exception, the law itself has foreseen the possibility that a departure from its provisions may be desirable if certain specified facts or circumstances are found to exist. A variance, on the other hand, involves and overriding of the law itself" *Id.*

Section 185-51 of the Code sets forth accessory buildings and structures that are permitted under the Code. By implication of the definition of accessory buildings and accessory structures, the buildings or structures allowed by §185-51 must be in the case of a building, “clearly incidental to or customarily found in connection with the main building...” and in the case of a structure, “of a nature customarily incidental and subordinate to, the principal structure.”

Section 185-67(c) allows under special circumstances for accessory buildings or structures like pergolas, gazebos and swimming pool auxiliary buildings to be allowed in the front yard setback. It also permits similar incidental structures under special circumstances. A pool safety fence is an accessory structure contemplated by §185-51 of the Code and is therefore an incidental structure that BOA may issue a special yard exception.