

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

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|------------------------|---|--------------------------|
| STANLEY ZOBBER and | : | |
| BEVERLY STURM, | : | C.A. No. K13A-09-001 WLW |
| | : | |
| Appellants, | : | |
| | : | |
| v. | : | |
| | : | |
| KENT COUNTY DEPARTMENT | : | |
| OF PLANNING SERVICES, | : | |
| | : | |
| Appellee. | : | |

Submitted: January 23, 2014

Decided: March 12, 2014

ORDER

Upon Appeal from the Decision of the
Kent County Board of Adjustment.

Reversed.

Stanley Zober, Jr. and Beverly J. Sturm, *pro se*

Noel E. Primos, Esquire of Schmittinger and Rodriguez, P.A., Dover, Delaware;
attorney for Appellee.

WITHAM, R.J.

Before the Court is the *pro se* appeal of Appellants Stanley Zober, Jr. (hereinafter “Zober”) and Beverly Sturm (collectively “Appellants”) from the decision of the Kent County Board of Adjustment (hereinafter “the Board”) denying Appellants’ application for several variances that would allow Appellants to build two homes on their property. After careful consideration of the record and the submissions by the parties, the decision of the Board is **REVERSED** for the reasons set forth below.

BACKGROUND

Appellants filed an application with the Kent County Department of Planning Services (hereinafter “the Department”) for three variances from Section 205-127 of the Kent County Code that would allow Appellants to build two homes on a currently undeveloped lot in the Meadowbrook Acres subdivision. Appellants’ property is zoned as RMH (Residential Manufactured Home). The variances concern the required road frontage, minimum lot size, and maximum density, respectively. The variances would, in essence, split Appellant’s property into two lots and would allow for the construction of two homes.

The Department issued a Staff Recommendation Report that recommended denial of the Appellants’ variance requests. The report stated that Appellants did not demonstrate an exceptional practical difficulty that would justify the variances, and noted that “approval of the requests could have a negative impact on the character of the area or to the nature of the zoning district if the variances are approved.” The Staff Report notes that the property was originally platted as two separate lots, lots 32 and 33, respectively, but the property was at some point combined into a single lot.

The Staff Report also describes six similar variance requests for properties in the surrounding area; five were approved, and one was denied.

A public hearing was held on August 15, 2013. Zober testified before the Board that he owns multiple rental properties in Meadowbrook Acres. Zober testified that the property in question was already equipped with two sewer laterals, previously installed by the county, that would allow for the construction of two homes. Zober stated that when he originally purchased the property in the 1970s, the property consisted of two separate lots. Zober claimed that at some point he received a phone call from “someone in the tax office” who persuaded Zober to combine the lots for tax purposes. Zober told the Board he did this to save money without fully knowing or appreciating the consequences of his decision. Zober testified that he continues to pay taxes on the property as if the property remains two separate and distinct lots.

A dotted line on a parcel map of Appellants’ property corroborated Zober’s testimony to the extent that the dotted line represented that a property line had once existed that separated the two separate lots, but had since been removed when the lots were combined. As for Zober’s testimony regarding the circumstances of the combination of the lots, members of the Board expressed confusion over Zober’s testimony, and also expressed doubt over the tax status of the property. The Board’s staff noted that there were no records of how the combination of the lots occurred. The Board explained that if Zober was in fact paying taxes for two different properties when he only owned one, he would have originally received two separate deeds, with two separate tax numbers. The Board only had one deed, and one tax number, before it during the meeting.

Zober acknowledged he could not verify that he paid taxes on each of the individual lots, but indicated that he might not have had all of the relevant documents pertaining to the property with him at the meeting. The Board's staff also indicated that the Board did not have the original deed for the property before it. The Board's chairperson asked if it were possible to obtain a copy of the original deed; the Board's staff indicated that it was not possible because the deed office was already "locked up" for the evening.

The Board's chairperson noted several times over the course of the hearing that the nature of the property was "very confusing," including the fact that the current deed for the property indicates it is one parcel, with one tax I.D. number, but with two lot numbers. The Board's counsel also noted that "the record at this time seems to be very muddled to say the least." The Board's staff explained that many of parcels in Meadowbrook Acres were of the same nature as what would result if the variances were granted; *i.e.*, the Meadowbrook Subdivision was originally designed as largely consisting of separate, smaller lots that were never combined, unlike the property at issue. The Board's chairperson stated several times throughout the hearing that the variance request may have to be "tabled" in order to consult the original deed and "so that we can have true documents before us."

The Board took comments from two Meadowbrook Acres residents. The first person to comment was Vivian McDonald (hereinafter "McDonald"), who expressed concern that landlords such as Zober did not properly maintain their properties and allowed them to fall into disrepair. The second person to comment was Bruce Murphy (hereinafter "Murphy"), another property owner who did not specifically

oppose Zober's application, but expressed frustration with the inconsistent makeup of Meadowbrook Acres. Murphy told the board: "if we are going to divide some of these here for some people, we have to divide them for all the people."

Despite the Board's multiple indications that its decision on the variance application would be tabled, the Board voted 6-1 to deny Appellants' application at a business meeting immediately following the public hearing. There is nothing in the record before the Court indicating why the Board chose to vote on the application instead of waiting to have the original deed and any other necessary documents before it. A Notice of Decision mailed on August 22, 2013 stated: "[t]his decision was based upon staff recommendation, the fact that the non-conformity of the parcel would be increased and that the testimony given provided no exceptional practical difficulty." The notice indicated that the Board member who voted against denying the application did so "because the Board has previously approved similar requests in this area, the original subdivision plan showed this as two lots and the applicant was provided two sewer laterals."

Appellants appealed the Board's decision on September 9, 2013. In their opening brief, Appellants argue that the Board's decision should have been tabled due to missing documentation. Appellants have provided several documents along with their opening brief, which they contend should have been considered by the Board before voting on the variance application. Appellants further argue that these documents establish an exceptional practical difficulty. These documents include: the original variance application; the current deeds for properties owned by Appellants; the property map with the dotted line indicating that the property was

originally separated as lots 32 and 33; the original property division design from 1965; the original deed for the property from 1967; and the property's tax card. The Board responds in its answering brief that the Court should not consider this additional evidence on appeal, and argues that the Board correctly applied the *Kwik-Check* factors in concluding that no exceptional practical difficulty existed.

STANDARD OF REVIEW

When a decision of the Kent County Board of Adjustment is appealed, this Court's review is "restricted to a determination of whether the Board's decision is free from legal errors and whether the Board's finding of facts and conclusions of law are supported by substantial evidence in the record."¹ Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."² It is more than a scintilla and less than a preponderance, and when substantial evidence exists, the Court "may not reweigh the evidence or substitute its own judgment for the Board's."³ The Board has wide discretion, and there is no abuse of discretion if the Board's decision is "fairly debatable," however the Board "may not do whatever it considers to be equitable without regard to statutory

¹ *Tolson v. Kent Cnty. Dep't. of Planning Serv.*, 2012 WL 1995796, at *2 (Del. Super. May 22, 2012) (citations omitted).

² *McKinney v. Kent Cnty. Bd. of Adjustment*, 2002 WL 1978936, at *4 (Del. Super. July 31, 2002) (citing *Wadkins v. Kent Cnty. Bd. of Adjustment*, 1999 WL 167776, at *2 (Del. Super. Feb. 23, 1999)).

³ *Mesa Commc'n Grp. v. Kent Cnty. Bd. of Adjustment*, 2000 WL 33110109, at *4 (Del. Super. Oct. 31, 2000) (citations omitted).

requirements and the need for substantial evidence to fulfill those requirements.”⁴
The Board must “particularize its findings of fact and conclusions of law to enable the Superior Court to perform its function of appellate review.”⁵

DISCUSSION

Under Delaware’s statute governing Boards of Adjustment, a reviewing court “may reverse or affirm, wholly or partly, or may modify the decision brought up for review.”⁶ This language has been construed as meaning that remand for further factual findings is not available to a court reviewing a decision of the Board of Adjustment.⁷ Accordingly, this Court has reversed decisions of the Board when the Board did not have substantial evidence before it when making a decision,⁸ and when the Board failed to particularize its findings of fact and conclusions of law.⁹ Notwithstanding the inability to remand a case for further factual finding, the Superior Court may properly hear additional evidence on appeal regardless of the fault of the parties, so that a “just decision” may be reached.¹⁰

⁴ *Gilman v. Kent Cnty. Dep’t of Planning*, 2000 WL 305341, at *2 (Del. Super. Jan. 28, 2000) (citations omitted).

⁵ *Id.* (citing *Profita v. New Castle Cnty. Bd. of Adjustment*, 1992 WL 390625, at *3 (Del. Super. Dec. 11, 1992)).

⁶ 22 *Del. C.* § 328(c).

⁷ *Mellow v. Bd. of Adjustment of New Castle Cnty.*, 565 A.2d 947, 951 (Del. Super. 1988).

⁸ *Mesa Comm’n Grp.*, 2000 WL 33110109, at *7.

⁹ *Id.* at *4; *Gilman*, 2000 WL 305341, at *4.

¹⁰ *Mellow*, 565 A.2d at 953.

Section 4917 of Title 9 of the Delaware Code provides:

[T]he Board of Adjustment shall have the following powers:

(3) Where by reason of . . . extraordinary and exceptional situation or condition of such piece of property, the strict application of any regulation adopted under this subchapter would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon, the owner of such property, to authorize, upon an appeal relating to such property, a variance from such strict application as to relieve such difficulties or hardship; provided such relief may be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of the zoning plan and zoning regulations.¹¹

Under this statutory standard, so-called “area variances” concerning practical difficulties in using particular property for permitted uses are determined subject to the “exceptional practical difficulty” standard.¹² This is a less burdensome standard compared to determining whether to grant “use variances” (variances from the permitted type of use for the land), and considers “whether a literal interpretation of the zoning regulations results in exceptional practical difficulties of ownership.”¹³

This difficulty cannot merely be theoretical or routine, and whether exceptional practical difficulty exists is determined by a weighing of the so-called *Kwik-Check*

¹¹ 9 *Del. C.* § 4917(c).

¹² *Mesa Commc’n Grp.*, 2000 WL 33110109, at *4 (citing *Bd. of Adjustment of New Castle Cnty. v. Kwik-Check Realty, Inc.*, 389 A.2d 1289, 1291 (Del. 1978)).

¹³ *Id.* (citations omitted).

factors.¹⁴ These factors include: (1) the nature of the zone where the property is located; (2) the character and uses of the immediate vicinity; (3) whether removal of the property restriction would seriously affect the neighboring property; and (4) whether failure to remove the restriction would create unnecessary hardship or exceptional practical difficulty for the owner in relation to his efforts to make normal improvements in the character of the use of the property which is a permitted use under the applicable ordinances.¹⁵

Economic hardship is one factor that may be considered in justifying an area variance, and the landowner's inability to improve his business or to stay competitive as a result of the restriction may amount to an exceptional practical difficulty.¹⁶ In this context, exceptional practical difficulty exists when "the requested dimensional change is minimal and the harm to the applicant if the variance is denied will be greater than the probable effect on neighboring properties if the variance is granted."¹⁷

As a prerequisite to meeting the *Kwik-Check* factors, the Board must particularize its findings of fact and conclusions of law. In this case, the Board's decision simply refers to the Staff Recommendation, "the fact that the non-conformity of the parcel would be increased" and states that no exceptional practical difficulty

¹⁴ *Id.*

¹⁵ *Id.* (citing *Kwik-Check*, 389 A.2d at 1291).

¹⁶ *Id.*

¹⁷ *Id.*

had been established. The record reflects that the non-conformity referred to was barely discussed at the public meeting, and the exact nature of the non-conformity is unclear from the record. The Staff Recommendation itself does not contain sufficient detail, and simply refers to the negative impact approving the variances could have on the character of the area or the nature of the zoning district. Neither the Staff Recommendation or the Board's decision references the five variances mentioned in the Staff Recommendation that were approved for similar requests. The dissenting Board member's statement that "the Board has previously approved similar requests in this area, the original subdivision plan showed this as two lots and the applicant was provided two sewer laterals" was also not addressed by the Board's decision. The nature of these sewer installations is also unclear from the record. Thus, facts that apparently provided the basis for the Board's decisions, and facts that arguably supported granting the variances, were left unaddressed or only vaguely referenced by the Board. The Board's decision also does not address Zober's argument that he initially purchased two separate lots and paid taxes on both of them; this is surprising, given how much time was spent on this argument during the public hearing.

Further, the Board on appeal refers to its weighing of the *Kwik-Check* factors, but it is unclear from the Board's decision which factors were given weight by the Board, or whether the factors were weighed at all. This Court has observed that "[t]he Board, and not the Court, has the duty to apply in the first instance the four factors of the exceptional practical difficulties standard."¹⁸ The easiest solution

¹⁸ *Gilman*, 2000 WL 305341, at *4.

would be to remand this case for the Board to apply the *Kwik-Check* factors, but that is not an option under the applicable statutory framework. Thus, reversal is necessary.

In addition to the Board's failure to particularize its findings of fact or its application of the *Kwik-Check* factors, the Board's decision also lacked substantial evidence. Members of the Board repeatedly referenced the confusing and complicated zoning nature of the Meadowbrook Acres subdivision and of Zober's property in particular, and the Staff Recommendation even noted that there were five similar variance requests that had been granted in the past. It is puzzling that there was no finding of fact on how any of this affected Appellants' application, or on the exact circumstances of the combination of Zober's two lots into one parcel. The documents offered by Appellants on appeal, including the original deed, could shed some light on these issues. The Board even indicated several times throughout the public hearing that it would need to reserve decision until it could reference these documents. It is unclear why it failed to do so. While the Court could consider this additional evidence for the first time on appeal, based on the unclear and confusing history and nature of Appellants' property and the vicinity, as well as the incomplete record, the Court declines to do so.

In sum, the Board's decision leaves the Court with more questions than answers, such as: the extent of the Board's weighing of the *Kwik-Check* factors; the reason why Zober's property was originally combined and what impact that would have on the determination; and the reason why the Board chose to deny the application based on an incomplete record rather than reserve its decision. Further,

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the significance of several facts, such as the granting of similar variances for similar properties in the vicinity and the presence of two sewer laterals on the property, is also unclear from the record. If the Court had the power to remand this case for further factual finding, it would do so. Because that is not an option, the Court must reverse.

CONCLUSION

In light of the Board's failure to particularize its findings of fact and application of the *Kwik-Check* factors, as well as the incomplete record and the Board's failure to have all the necessary information before it when it denied Appellants' application, the decision of the Board must be **REVERSED**.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh